

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF MICHIGAN  
3 SOUTHERN DIVISION

4 UNITED STATES OF AMERICA,  
5 STATE OF MICHIGAN,  
6 Plaintiffs,

7 -v- Case No. 10-14155

8 BLUE CROSS BLUE SHIELD  
9 OF MICHIGAN  
10 Defendant.

11 \_\_\_\_\_/

12 DEFENDANT'S MOTION TO DISMISS  
13 BEFORE THE HONORABLE DENISE PAGE HOOD  
14 United States District Judge  
15 237 U.S. Courthouse and Federal Building  
16 231 Lafayette Boulevard West  
17 Detroit, Michigan 48226  
18 Tuesday, April 19, 2011

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION  
THE SHANE GROUP and  
BRADLEY A. VENEBERG,  
Plaintiffs,  
-v- Case No. 10-14360  
BLUE CROSS BLUE SHIELD  
OF MICHIGAN  
Defendant.  
\_\_\_\_\_/

PLAINTIFFS' MOTION HEARING  
BEFORE THE HONORABLE DENISE PAGE HOOD  
United States District Judge  
237 U.S. Courthouse and Federal Building  
231 Lafayette Boulevard West  
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1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF MICHIGAN  
3 SOUTHERN DIVISION

4 MICHIGAN REGIONAL CARPENTERS  
5 EMPLOYEE BENEFITS FUND, et al,  
6 Plaintiffs,

7 -v- Case No. 10-14887

8 BLUE CROSS BLUE SHIELD OF  
9 MICHIGAN,  
10 Defendant.

11 \_\_\_\_\_/

12 MOTION HEARING

13 BEFORE THE HONORABLE DENISE PAGE HOOD

14 United States District Judge

15 237 U.S. Courthouse and Federal Building

16 231 Lafayette Boulevard West

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1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF MICHIGAN  
3 SOUTHERN DIVISION

4 SCOTT STEELE,  
5 Plaintiff,

6 -v- Case No. 11-10375

7 BLUE CROSS BLUE SHIELD  
8 OF MICHIGAN  
9 Defendant.

10 \_\_\_\_\_/

11 MOTION HEARING

12 BEFORE THE HONORABLE DENISE PAGE HOOD

13 United States District Judge

14 237 U.S. Courthouse and Federal Building

15 231 Lafayette Boulevard West

16 Detroit, Michigan 48226

17 Tuesday, April 19, 2011

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1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF MICHIGAN  
3 SOUTHERN DIVISION

4 CITY OF PONTIAC,

5 Plaintiff,

6 -v-

Case No. 11-10276

7 BLUE CROSS BLUE SHIELD

8 OF MICHIGAN, et al

9 Defendants.

10 \_\_\_\_\_/

11 MOTION HEARING

12 BEFORE THE HONORABLE DENISE PAGE HOOD

13 United States District Judge

14 237 U.S. Courthouse and Federal Building

15 231 Lafayette Boulevard West

16 Detroit, Michigan 48226

17 Tuesday, April 19, 2011

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1 Tuesday, April 19, 2011

2 Detroit, Michigan.

3 At approximately 2:30 p.m.

4 THE CLERK: Calling civil case number  
5 10-14155, United States and State of Michigan versus  
6 Blue Cross Blue Shield of Michigan; case number  
7 10-14360, The Shane Group, Inc., et al versus Blue Cross  
8 Blue Shield of Michigan; case 10-14887, Michigan  
9 Regional Council of Carpenters Employee Benefits Fund,  
10 et al, versus Blue Cross Blue Shield; case number  
11 11-10375, Scott Steele versus Blue Cross Blue Shield of  
12 Michigan; case number 11-10276, City of Pontiac versus  
13 Blue Cross Blue Shield of Michigan and various Defendant  
14 Hospitals.

15 THE COURT: I have some appearances here.  
16 David Gringer, Ryan Danks.

17 MR. GRINGER: He is not here.

18 THE COURT: Dee Pascoe.

19 MR. PASCOE: Yes, Your Honor.

20 THE COURT: Joseph Wayland.

21 MR. WAYLAND: Yes, Your Honor.

22 THE COURT: And who is also at counsel  
23 table?

24 Elizabeth Lippitt; is that right?

25 MS. LIPPITT: Yes.

1 THE COURT: And the two gentlemen behind  
2 you, are they also with you?

3 MR. LEIBSKIND: Richard Liebskind, Your  
4 Honor, for the Government. L I E B E S K I N D.

5 THE COURT: And who else?

6 MR. JOYCE: Barry Joyce also --

7 THE COURT: Joyce; J O Y C E?

8 THE COURT: And are you all with the  
9 Department of Justice?

10 MR. JOYCE: Yes, Ma'am.

11 THE COURT: Is that everyone for the  
12 Government?

13 MR. WAYLAND: Yes.

14 THE COURT: And then I have in the jury box,  
15 Counsel for the Shane Group and Bradley Veneberg, and I  
16 have E. Powell Miller.

17 MR. MILLER: Yes, Your Honor.

18 THE COURT: And someone from New York?

19 MR. ISQUITH: Fred Isquith, Your Honor, way  
20 in the back. It is Fred Isquith; I S Q U I T H.

21 THE COURT: And you're with whom?

22 MR. ISQUITH: Wolf Haldenstein. We're in  
23 the New York office.

24 THE COURT: And you're with the Shane Group?

25 MR. ISQUITH: I am.

1 THE COURT: But you don't want to sit up  
2 there with them?

3 MR. ISQUITH: When it is our turn, I will  
4 come right up.

5 THE COURT: Come up, Counsel, and have a  
6 seat in the jury box.

7 Anybody else here for the Shane Group? Oh,  
8 David Fink, right?

9 MR. FINK: Yes, Your Honor.

10 THE COURT: Anybody else? Okay.

11 And Counsel for the Michigan Regional  
12 Council of Carpenters Employee Benefits Fund, Daniel  
13 Small?

14 MR. SMALL: Yes, Your Honor.

15 THE COURT: Are you the only one?

16 MR. SMALL: I believe so.

17 THE COURT: And for Scott Steele, Daniel  
18 Gustafson?

19 MR. GUSTAFSON: Yes, Your Honor. Good  
20 afternoon.

21 THE COURT: Good afternoon.

22 And is Daniel Hedlund also here?

23 MR. GUSTAFSON: He is not here, Your Honor.

24 THE COURT: And then Alyson Oliver.

25 MS. OLIVER: Yes, Your Honor.

1 THE COURT: How are you, Ms. Oliver?

2 MS. OLIVER: Fine, Your Honor, thank you.

3 THE COURT: Is that all for Scott Steele?

4 MS. OLIVER: Yes, Your Honor.

5 THE COURT: Then Counsel for the city of  
6 Pontiac, I have Amy Keller.

7 MS. KELLER: Yes, Your Honor.

8 THE COURT: And then Lance Young.

9 MR. YOUNG: Good morning.

10 THE COURT: Good afternoon. Don't throw me  
11 off here.

12 Eric Goldstein.

13 MR. GOLDSTEIN: (Nods head yes).

14 THE COURT: Robert Anthony Alvarez.

15 MR. ALVAREZ: Yes, Your Honor.

16 THE COURT: And Mario Cascante. How are  
17 you?

18 MR. CASCANTE: Fine, Your Honor.

19 THE COURT: And who else is in the jury  
20 box?

21 MR. THOMPSON: Jason Thompson, Your Honor,  
22 for Pontiac.

23 THE COURT: Jason Thompson, and for whom?

24 MR. THOMPSON: Pontiac.

25 THE COURT: And then I have for Blue Cross

1 Blue Shield and the Hospital Defendants on this side.

2 Everyone is smiling.

3 Okay, Donald Bruce Hoffman.

4 MR. HOFFMAN: Here, Your Honor.

5 THE COURT: Todd Stenerson.

6 MR. STENERSON: Here, Your Honor.

7 THE COURT: Is that a correct pronunciation?

8 MR. STENERSON: Yes, Your Honor.

9 THE COURT: And then I have Robert Phillips.

10 MR. PHILLIPS: Yes, Your Honor.

11 THE COURT: You don't want to be at the  
12 table?

13 MR. PHILLIPS: I think Blue Cross has enough  
14 lawyers up there.

15 THE COURT: And then Joseph Fink.

16 MR. FINK: Here, Your Honor.

17 THE COURT: You don't want to be here,  
18 either?

19 MR. FINK: It would be surplusage.

20 THE COURT: Thomas McNeill. How are you?

21 MR. McNEILL: Thanks, Your Honor.

22 THE COURT: And that's all I have, right.  
23 One other?

24 MR. HIGBEE: David Higbee.

25 THE COURT: For Blue Cross?

1 MR. HIGBEE: Yes. H I G B E E.

2 THE COURT: And then I have for Ascension,  
3 Genesis and others. Do I have anybody else for Blue  
4 Cross?

5 MR. LASKEN: Jonathan Lasken.

6 THE COURT: Jonathan --

7 MR. LASKEN: Lasken; L A S K E N.

8 THE COURT: Alright, is that all?

9 MR. RUMLEY: Your Honor, Jeffrey Rumley --  
10 R U M L E Y -- General Counsel for Blue Cross.

11 THE COURT: What is your first name again?

12 MR. RUMLEY: Jeffrey.

13 THE COURT: Thank you.

14 And then Ascension and others, there is  
15 Melissa Gorsaland?

16 MS. GORSALAND: Yes, Your Honor.

17 THE COURT: And Keefe Brooks.

18 MR. BROOKS: That's correct, Your Honor.

19 THE COURT: Anybody else for that Group?

20 MR. BROOKS: No, Your Honor.

21 THE COURT: And for Botsford, Brian Ziff.

22 MR. ZIFF: Yes, Your Honor.

23 THE COURT: And Paul Coughenour.

24 MR. COUGHENOUR: Yes, Your Honor.

25 THE COURT: Anybody else with you?

1 MR. ZIFF: No, Your Honor.

2 THE COURT: And for Gratiot Community  
3 Hospital, Marquette General Hospital and others, I have  
4 David Ettinger.

5 MR. ETTINGER: Yes, Your Honor.

6 THE COURT: And are you only one?

7 MR. ETTINGER: Yes, Your Honor.

8 THE COURT: And then for Munson, I have  
9 Richard Kraus.

10 MR. KRAUS: Yes, Your Honor.

11 THE COURT: Anyone else?

12 MR. KRAUS: And I'm here for Sparrow as  
13 well.

14 THE COURT: I'm sorry, yes, Sparrow as well.  
15 And then for Beaumont, Bruce Sendek.

16 MR. SENDEK: Good afternoon, Your Honor.

17 THE COURT: And Sheldon Klein.

18 MR. KLEIN: Yes, Your Honor.

19 THE COURT: Is there anyone at that table  
20 that I missed? No.

21 Any other representatives that I missed?  
22 No.

23 Okay, very good. Welcome.

24 We have some Motions here, and I have a  
25 Motion to Dismiss, and a Motion to Stay Discovery



1 pending a ruling on the Defendant's Motion to Dismiss.  
2 It is Blue Cross's Motion to Dismiss and Motion to Stay.  
3 Blue Cross's Motion to Strike the Michigan Attorney  
4 General's Statement, Docket Number 34. And the United  
5 States and Michigan's Motion to Compel Production of  
6 Documents and a scheduling conference. And also a  
7 Motion to Consolidate; is that right? And to appoint an  
8 Interim Class and Liaison Counsel. Should I have  
9 anything else?

10               Somebody filed some motions yesterday after  
11 the close of business -- well, the close of the Court,  
12 if I'm not mistaken; is that right?

13               MR. STENERSON: The Hospital Defendants did,  
14 Your Honor. Obviously not with the expectation that we  
15 will address it today.

16               THE COURT: Right. I just wanted to note  
17 that I have those; to recognize that I do have them.

18               I need to make a couple disclosures, and  
19 that is I have listed on here some people who used to be  
20 former interns, and I do this by way of disclosing. I  
21 don't think it creates a conflict, if you all see  
22 otherwise, please let me know. But I have on the  
23 pleadings Farayha Arrine, and Mario Cascante and Amy  
24 Keller. And if you think that creates a conflict, you  
25 can let me know that in writing. I don't think it does.

1 Ms. Arrine, when were you here?

2 MS. ARRINE: I was here in 2008 and 2009;  
3 part of each.

4 THE COURT: And Ms. Keller?

5 MS. KELLER: In 2004, Your Honor.

6 THE COURT: And Mr. Cascante?

7 MR. CASCANTE: In 2008, Your Honor.

8 THE COURT: Very good, then I'm ready to  
9 proceed if you're ready to proceed.

10 MR. WAYLAND: Yes, Your Honor.

11 THE COURT: I have some documents, who  
12 brought those?

13 MR. WAYLAND: The presentation, Your Honor,  
14 submitted by the Government.

15 I will go through that when it is my turn.  
16 I believe Blue Cross probably wants to take the lead on  
17 the Motions.

18 MR. McNEILL: Your Honor, Tom McNeill from  
19 Dickinson Wright. Unless you direct otherwise, we would  
20 propose the Motion to Dismiss the Government's case, and  
21 handling the Motion on those issues would be Bruce  
22 Hoffman and also Todd Stenerson.

23 THE COURT: Mr. Hoffman and who else?

24 MR. McNEILL: Mr. Stenerson.

25 THE COURT: And then what would you like to

1 do, Mr. McNeill?

2 MR. McNEILL: We're really at the direction  
3 of the Court. We have some ideas on how we might  
4 address the Motion to Dismiss, and maybe I could turn  
5 over the speaking part here to Mr. Hoffman to make that  
6 proposition.

7 THE COURT: Do you have any objection to  
8 allowing them to go first?

9 MR. WAYLAND: Not at all, Your Honor.

10 THE COURT: Very good.

11 MR. HOFFMAN: Thank you, Your Honor.

12 THE COURT: Everybody here on all the cases,  
13 right? All the Motions set for 2:30, 3:30 and 4  
14 o'clock, right? And all those appearances are already  
15 on, right?

16 Very good, then I'm ready for you to tell me  
17 how you would like me to proceed.

18 MR. HOFFMAN: Let me, with your permission,  
19 we have some materials as well, and I thought I would  
20 come up --

21 THE COURT: Are all of those for me?

22 MR. HOFFMAN: These are actually three sets  
23 of copies of materials, and they consist of my  
24 presentation, and then some consist of documents that  
25 have been previously submitted as Appendices, and extra

1 copies in case you don't have them readily accessible  
2 with you that we might spend a couple of minutes talking  
3 about, or might not depending on where we're at.

4 THE COURT: Everyone has that?

5 MR. HOFFMAN: We're about to pass it out.

6 And Your Honor, with your permission, I'm  
7 also going to flip this board around. This particular  
8 board, Your Honor, which is the only one I'm going to  
9 refer to, does not contain any particular rocket science  
10 on it, and I'm going to read it out in any event. So I  
11 think that everybody will have sufficient access to it.

12 Your Honor, if everybody is ready, thanks  
13 again for giving us the time to come in today. As  
14 previously mentioned, I'm Bruce Hoffman from the Hunton  
15 Williams law firm here representing Blue Cross Blue  
16 shield of Michigan.

17 Your Honor, we are obviously happy to  
18 proceed in discussing the Motion to Dismiss in any  
19 sequence that you would prefer or answer any questions  
20 you might have. However, we had a suggestion.

21 The Motion raises what you might think of as  
22 two really different sets of issues.

23 The first set of issues, which you might  
24 call the regulatory issues, have to do with state action  
25 immunity and abstention.

1                   The second set of issues have to do with  
2     pleading deficiencies. Issues that we raise under  
3     Twombly and its progeny and Weyerhaeuser and its  
4     progeny.

5                   Our suggestion would be that we argue them  
6     that way. In other words, we proceed in arguing the  
7     regulatory defenses, which I'm going to handle, and then  
8     the Government would respond, and I would like to  
9     reserve a little bit of time, couple of minutes, for  
10    rebuttal.

11                  After that, Mr. Stenerson will address the  
12    pleading issues, and then again, the Government can  
13    respond. And we can wrap up by dealing with the state  
14    law claims, depending on how time goes, which I don't  
15    think will take very long.

16                  THE COURT: And is that how you would like  
17    to proceed?

18                  MR. WAYLAND: Your Honor, I will be arguing  
19    all of the Government's case, and I will prefer to do it  
20    at one time. But I am happy to accommodate Counsel if  
21    it is more convenient for them.

22                  THE COURT: I think you should do it by  
23    arguing your part and let your Co-counsel argue his  
24    part, and then let the Government respond. I would  
25    like the Government to respond in the same order that

1 they argue. That way, you can have the two pieces and  
2 then you can both have a rebuttal.

3 MR. HOFFMAN: Certainly, Your Honor. Thank  
4 you.

5 THE COURT: You don't feel double teamed by  
6 them?

7 MR. WAYLAND: Not at all, Your Honor. I  
8 welcome the opportunity.

9 MR. HOFFMAN: He has us surrounded, Your  
10 Honor.

11 THE COURT: Well, I prefer to do it that  
12 way, so I have all your arguments together in my notes.

13 MR. HOFFMAN: Certainly. And thank you  
14 again for the opportunity.

15 Let me start with this point, and really  
16 this is, I think, the fundamental point of all the  
17 issues that we raise in certainly the regulatory portion  
18 of the Motion to Dismiss.

19 There should be no mistake that this case is  
20 a direct attack on Michigan's extremely comprehensively  
21 regulated system for providing health care. A system,  
22 Your Honor, that has worked.

23 As the White House noted in the report that  
24 we attach as Appendix 4 to our Motion to Dismiss, in  
25 Michigan, for the last decade, the State experienced the

1 lowest rate of increase of health insurance premiums of  
2 any state in America.

3 That is the system, the system that produced  
4 that result, that is under attack by the case that has  
5 been filed by the Government.

6 Now, Your Honor, to delve into that just a  
7 little bit, I would like to invite the Court's attention  
8 to the second page of the packet I handed out where I  
9 point where we provide a little bit of background, just  
10 a couple of quotes describing the regulatory system here  
11 for health care.

12 THE COURT: This packet (indicating)?

13 MR. HOFFMAN: That's correct, Your Honor.

14 THE COURT: Okay.

15 MR. HOFFMAN: And page 2 has a title, which  
16 says, "This is An Attack On Michigan's Heavily Regulated  
17 Health Care System."

18 The first quote comes from a case called  
19 Genord from the Sixth Circuit, and it says, quote:

20 "Blue Cross is a 'health care corporation'  
21 that is regulated extensively by the  
22 Michigan Commissioner of Insurance under the  
23 Nonprofit Health Care Corporation Reform  
24 Act."

25 Which, Your Honor, is what we refer to as

1 P.A. 350.

2 The second quote comes from a decision last  
3 January by the Michigan Court of Appeals, and it talks  
4 about how P.A. 350 is administered. And the appellate  
5 court said:

6 "The Legislature intended that the  
7 commissioner...

8 And that is the commissioner of insurance,  
9 the head of OFIR.

10 "...be primarily responsible for regulating  
11 {Blue Cross}. Balancing the often  
12 conflicting goals of P.A. 350 requires  
13 considerable expertise. The statutory goals  
14 of that statute are defined in terms of  
15 reasonableness, and the commissioner is  
16 granted wide discretion to determine what is  
17 reasonable. The commissioner's  
18 exercise of that discretion must be  
19 respected."

20 Now, Your Honor, that is going to frame up  
21 most of the issues that I'm going to address. But there  
22 are two separate ways you can dismiss this case because  
23 of its attack on Michigan's health care system. The  
24 first is state action immunity. The second is Burford  
25 abstention.



1 I'm going to speak today on four basic  
2 points, which is what this board says that we have on  
3 display over there.

4 First, Blue Cross is heavily regulated under  
5 P.A. 350, and a whole bunch of other statutes, which are  
6 mostly described in our briefs. And, conduct of the  
7 type challenged here was clearly foreseeable under that  
8 extensive statutory regulatory scheme.

9 Second, because Blue Cross is a quasi-public  
10 state created tool of state policy, all that it needs to  
11 show for state action immunity is that it was heavily  
12 regulated and its conduct was foreseeable.

13 But third, if needed, Blue Cross's conduct  
14 easily meets the active supervision test for state  
15 action immunity.

16 And fourth, and finally, the Court should  
17 abstain from hearing this case because it would disrupt  
18 Michigan's complex regulatory scheme.

19 Your Honor, any of those is sufficient for  
20 this Court to dismiss this case. Obviously, all of  
21 them would be more than enough to dismiss the case, but  
22 any of those would suffice.

23 Let me turn, Your Honor, to state action  
24 immunity.

25 I think, Your Honor, the first point to bear

1 in mind in terms of state action immunity, and this has  
2 been extensively briefed, there is a lot of discussion,  
3 there is a lot of Appendices, there are a lot of  
4 documents. The statutory provisions at issues here are  
5 quite long.

6 The Department of Justice, in its response  
7 here, points to no case with regulation even remotely  
8 close to the extent and detail of the regulatory scheme  
9 at issue here where state action immunity was denied.

10 Now, the first question under state action  
11 immunity is simply this: Was there a clearly  
12 articulated state policy to displace competition with a  
13 regulatory structure and was the conduct at issue a  
14 foreseeable result of that policy.

15 And if Your Honor flips to the next page  
16 which we have, to page 3, I'm not going to belabor this  
17 point. It was extensively discussed in our briefs, and  
18 I don't think, frankly, it is seriously disputed.

19 It is quite clear, and this comes from both  
20 the Michigan Supreme Court and the relevant statutes,  
21 that unfettered competition has been displaced by an  
22 extensive regulatory structure in Michigan governing  
23 health care.

24 The Michigan Supreme Court said, quote:

25 "It is widely recognized that the health

1 care system does not, and has not, operated  
2 as a competitive market."

3 And that Michigan's regulatory structure is,  
4 quote:

5 "...a unique statutory scheme which combines  
6 both free-market and government regulatory  
7 methods of control."

8 P.A. 350 was the primary legislation aimed  
9 at creating that mixed regulatory competitive structure  
10 in which there is not unfettered competition but rather  
11 you have a regulatory system with some competition along  
12 with it.

13 If you turn the page to the next slide, Your  
14 Honor, which we have as number four, this points out a  
15 second component of Michigan's extensive regulation of  
16 health care, and it is very simply this: Blue Cross is  
17 not just intensively regulated, it is the instrument of  
18 the State's regulatory structure.

19 As the Michigan legislature stated in P.A.  
20 350, in order to assure that all people of this State  
21 reasonable access to health care, quote, at a fair and  
22 reasonable price, quote, it is the intention of the  
23 legislature to provide for the regulation and  
24 supervision of Blue Cross.

25 And as the Michigan Supreme Court said, Blue

1 Cross is, quote, not carried on as an insurance  
2 business, but rather provides a method for promoting the  
3 public health and welfare, closed quote.

4           And as part of that, and as the other points  
5 we make on this slide show, Blue Cross is provided with  
6 a number of specific obligations, and mainly, Your  
7 Honor, those take the form of an obligation to provide  
8 comprehensive health care coverage. In every part of  
9 Michigan. Available to everybody. Without  
10 underwriting. Without the ability to turn down people  
11 because they're sick. Without the ability to say well,  
12 we're not going to serve some large part of the State of  
13 Michigan because it is not profitable to be there. Blue  
14 Cross has to been there and has to offer service.

15           In exchange for that, or better put, in  
16 order to make that possible, Blue Cross is given a  
17 number of statutory tools, and those are what we're  
18 going to talk about later, some of them are described  
19 here.

20           That's all that is necessary, Your Honor, to  
21 show that unfettered competition is displaced with a  
22 regulatory structure in Michigan. I don't think that  
23 can be seriously disputed.

24           The next question is simply whether the  
25 conduct at issue was foreseeable under that regulatory

1 structure.

2 Well, the first question there is simply  
3 this: What is the conduct at issue? The answer is very  
4 simple. The conduct challenged in the Department of  
5 Justice's Complaint is Blue Cross's use of its size in  
6 order to obtain competitive advantages over commercial  
7 insurers in the form of better prices or equal prices  
8 from hospitals. In other words, Blue Cross is using its  
9 size to obtain competitive advantages.

10 Well, Your Honor, if you turn to the next  
11 page, which we have as page number five, we have  
12 outlined here a couple of quotes, and there are many  
13 cited in our brief, which illustrate that conduct was  
14 not only a foreseeable outcome of the extensive  
15 regulatory structure here, it was, in fact, foreseen.

16 As the House of Representatives stated in  
17 House Bill 4555's First Analysis back when P.A. 350 was  
18 being actively debated, quote:

19 "If the Blues did not cover so many  
20 people..."

21 -- If Blue Cross was not large --

22 "...they would find it difficult to  
23 negotiate the discounts and lower rates of  
24 reimbursement for hospitals and physicians  
25 they enjoy as advantages over the commercial

1 insurers."

2 Closed quote.

3 The statute states:

4 "No portion of {Blue Cross's} fair share of  
5 hospitals' reasonable financial requirements  
6 shall be borne by other health care  
7 providers. However, this subdivision shall  
8 not preclude reimbursement arrangements  
9 which include financial incentives and  
10 disincentives."

11 And:

12 "Subject to that, and to balancing cost  
13 against availability and quality, the  
14 {insurance) Commissioner is tasked with  
15 ensuring that Blue Cross's provider  
16 contracts do not shift more than Blue  
17 Cross's fair share of costs..."

18 So Your Honor, the Legislature foresaw that  
19 Blue Cross would, quote, use its size to obtain  
20 competitive advantages over commercial insurers and that  
21 in doing so, in its contracts with hospitals, costs  
22 could be shifted to those commercial competitors.

23 That could not be more clear evidence of  
24 foreseeability. And actually, in fact, foresees the  
25 conduct.

1                   On our next slide, Your Honor, we have a few  
2     quotes from the Supreme Court and the Sixth Circuit, and  
3     a Michigan appellate court case, I think, underscoring  
4     the point, which again can't seriously be debated, that  
5     evidence of this nature vastly exceeds the type of  
6     evidence necessary to establish the foreseeability  
7     aspect of the clearly articulated state policy planned.

8                   Now Your Honor, the Department of Justice  
9     doesn't, I think, make a serious argument against the  
10    conduct at issue. This is no mere broad authority to  
11    contract or home rule statute as was at issue in, for  
12    example, the First American Title case that the  
13    Department tries to lean on in its brief. Those kinds  
14    of statutes say nothing about the conduct at issue.

15                  Here, we have a statutory structure and  
16    specific legislative commentary contemplating exactly  
17    the kind of conduct at issue.

18                  It doesn't matter, Your Honor, contrary to  
19    the Department of Justice's argument, that the State has  
20    allowed some limited heavily regulated competition to  
21    co-exist in this regulatory structure. You don't need  
22    to have a command-controlled-government-run economy in  
23    order to have state action immunity.

24                  The Government said, well, there is some  
25    competition here, and they point to a couple of

1 statutes, which taken together, show no more than the  
2 Government has not abolished competition, and they say  
3 that means there is no clearly articulated state policy.  
4 But as this District held in rejecting this exact  
5 argument in the Miranda versus Michigan case, quote:

6 "Plaintiffs assert that the relevant  
7 state policy in this case as expressed by  
8 Michigan's Telecommunications Act, which  
9 was enacted in an effort to allow and  
10 encourage competition. According to  
11 Plaintiffs, based on the plain language of  
12 the {Act}, suppression of competition cannot  
13 be considered a foreseeable result. The  
14 relevant question, however, is  
15 not whether the State of Michigan has a  
16 general policy disfavoring anticompetitive  
17 conduct, a fact which Defendants themselves  
18 do not dispute, but rather, whether, despite  
19 its general policy disfavoring  
20 anticompetitive conduct, the State of  
21 Michigan has granted the {regulator} the  
22 authority to take action that would  
23 foreseeably result in anticompetitive  
24 effects."

25 And that is at page 754 of the Miranda



1 decision.

2                   Finally, Your Honor, the Department's  
3 argument that Michigan was required to expressly  
4 anticipate and specifically allow not just any  
5 competitive conduct, but the exact conduct at issue with  
6 the exact effect alleged is just wrong.

7                   First of all, Your Honor, Michigan did  
8 exactly that, which is what the point I made above  
9 illustrates, but it is just not the law.

10                  If you turn to the next slide, which is  
11 number 7, we just recite here the Supreme Court and the  
12 Sixth Circuit over and over and over again rejecting  
13 this exact argument expressed in exactly the same words  
14 written in the Department of Justice's brief. It is a  
15 multiple loser in the Sixth Circuit; a multiple loser at  
16 the Supreme Court.

17                  It is enough that the statute generally  
18 contemplates that there could be anticompetitive  
19 results; that the results of the regulatory structure  
20 might differ from where you would get under competition.  
21 That is enough. We have vastly more than that here.

22                  That, Your Honor, is my first main point.  
23 The second is that this is all Blue Cross needs to show.  
24 In other words, as you might put it in terms of the  
25 Prong One and Prong Two of state action, that Blue Cross

1 is a Prong One entity, all it needs to show is a clearly  
2 articulated pay policy.

3 And again, Your Honor, we think this is a  
4 pretty simple issue.

5 As outlined in great detail in our briefs,  
6 courts considering similar facts have repeatedly held  
7 that entities like Blue Cross, quasi-public, in those  
8 words, state created entities, that serve as tools of  
9 state policy, particularly in health care, need only  
10 show clear articulation.

11 The Department answers none of the cases we  
12 cite. They point to no case in which a quasi-public  
13 health care authority was found to have to be actively  
14 supervised by the State.

15 They don't address any of the factors that  
16 the various courts considered in determining whether or  
17 not an entity is entitled to state action immunity on a  
18 mere showing of clear articulation. None of them.

19 We have compiled some of them, Your Honor,  
20 at the next page, page 8, wherein one column outlines a  
21 number of factors considered by a number of courts from  
22 the Sixth Circuit, the Seventh Circuit and the Eleventh  
23 Circuit on when an entity need only show clear  
24 articulation to have state action immunity. And we  
25 compare those with the facts in the Sixth Circuit

1 Consolidated Television case and with the facts here.

2 And as you can see, Your Honor, I won't  
3 spend additional time on this slide, but Blue Cross  
4 lines up with the authorities on the factors that  
5 demonstrate it need only show clear articulation across  
6 the board.

7 Now, the Department of Justice tries to use  
8 the Sixth Circuit decision in the Riverview case to say,  
9 well, Blue Cross is not a Prong One entity.

10 Our next page, Your Honor, which is page 9,  
11 goes in detail through all the reasons why Riverview is  
12 completely off point here.

13 Fact after fact after fact, it is  
14 inconsistent with the facts present here, which,  
15 instead, line up with Consolidated Television where the  
16 entity was found by the Sixth Circuit to be a Prong One  
17 only entity.

18 There is only really one of these, though,  
19 that the Department of Justice talks about at all, and  
20 that is this one I'm going to focus on.

21 The Department of Justice says well, in the  
22 Riverview case, 40 percent of the board had to be public  
23 employees, so that has much more connection to the State  
24 than Blue Cross has.

25 That is dead wrong, Your Honor. In the

1 Riverview case, all that occurred was that the enabling  
2 municipal ordinance actually said that 40 percent of the  
3 board of the entity, a minority, had to be public  
4 officials, but it said nothing about who they were. It  
5 said nothing about how they were appointed. It  
6 exercised no control over it whatsoever.

7               So the majority of the board was completely  
8 unregulated, and out of that 40 percent, the composition  
9 was picked by the entity itself with the sole  
10 requirement that they be public officials of some sort  
11 from somewhere.

12              In contrast, both here and in Consolidated  
13 Television, the enabling legislation dictates 100  
14 percent the entire composition of the board.

15              Blue Cross's board is statutorily dictated  
16 down to a very minute level of detail over exactly who  
17 the board members should be. It doesn't name them, but  
18 it says they have to represent, for example, public  
19 units, small employers of size less than X, physicians,  
20 et cetera, et cetera. And beyond that -- and beyond  
21 that -- the State itself, the governor appoints four of  
22 Blue Cross's board members. Nothing like that was  
23 present in the Riverview case.

24              Now, the Department of Justice's main  
25 argument as to why Blue Cross isn't a Prong One entity

1 is that Blue Cross has correctly argued that it is not a  
2 quote, state actor, closed quote, under 42 USC Section  
3 1983.

4           The Sixth Circuit and many others courts  
5 have made it clear over and over again that the state  
6 actor test under Section 1983 does not determine whether  
7 an entity is a Prong One entity under state action  
8 immunity. And frankly, Your Honor, you need look no  
9 further than the Sixth Circuit decision in the McCarthy  
10 decision, McCarthy versus Middle Tennessee Electric  
11 Membership Corp., which addresses this issue head-on.

12           Now, it addressed it in dicta, but it is  
13 pretty clear in that case, and if you turn to page 10 of  
14 our slides, first, the Sixth Circuit pointed out that  
15 the semi-public electric cooperatives at issue in that  
16 case were not state actors under Section 1983.

17           But then the court went on to say  
18 nevertheless, quote:

19           "We agree with the Seventh Circuit that the  
20 Cooperatives are neither state agencies nor  
21 purely private parties..."

22           And as a result of that, the law requires --  
23 "...a grant of antitrust immunity in spite  
24 of a lack of supervision."

25           And that agrees with the Seventh Circuit

1 decision in the Hughes case, which reaches the same  
2 conclusion that semi-private, semi-public entity that is  
3 acting to effectuate state policy need only show clear  
4 articulation.

5               This is, of course, consistent with the  
6 long, long string of cases, and we also cite the  
7 Broderick case, which in 1976, pointed out that Section  
8 1983 is not dispositive on the question of whether  
9 somebody gets Prong One treatment.

10              So that, Your Honor, answers my second key  
11 point. All Blue Cross needs to show is clear  
12 articulation, and it plainly is present here, Your  
13 Honor.

14              Let me turn now to active supervision. This  
15 is the next page of our handout. It is actually a  
16 pretty simple question. Active supervision merely  
17 requires that state officials have and exercise power to  
18 review particular anticompetitive acts of private  
19 parties and disapprove those that fail to accord with  
20 state policy. That's the Supreme Court Patrick v Burget  
21 case.

22              How is that established? How do you know if  
23 the state act can be supervised? Well, there is a long  
24 line of cases on how you know that, but here are  
25 examples of the kinds of conduct that have been found to

1     cause active supervision:

2                     (1) Acknowledging the presence of challenged  
3     provisions in regulatory orders.

4                     There is no requirement that the regulator  
5     opine one way or the other, the regulator discussing  
6     provisions suffices.

7                     (2) Reviewing similar conduct in the past  
8     with the ability to act in the future.

9                     (3) Carrying out regular reviews of the  
10    defendant's conduct.

11                    (4) Providing a forum to receive and act on  
12    complaints.

13                    Case after case after case, Your Honor, and  
14    these cases post-date the FCC versus Ticor case that the  
15    Department of Justice tries to lean on.

16                    Now, Your Honor, the Department says, well,  
17    Blue Cross has to show that the Commissioner of  
18    Insurance reviewed and approved the exact conduct in  
19    question. Not just similar conduct and could review the  
20    exact conduct, that is flatly contradicted by the  
21    Supreme Court in the Patrick case but that is what they  
22    say.

23                    Then they say, not only that, but the  
24    Commissioner had to review that exact conduct at some  
25    exact magical moment. It can't be retrospective. It

1 can't be that, oh, the Commissioner looked back at Blue  
2 Cross's conduct to evaluate it. And they say it can't  
3 be prospective. The Commissioner can't look at a  
4 conduct clause that hasn't yet taken effect and I say I  
5 see this clause is fine.

6 According to the Department of Justice,  
7 there is some magic moment at which this review has to  
8 occur.

9 And not only that, they say the review must  
10 be done with some specific set of procedural hoops  
11 imposed on state regulators by federal law where the  
12 state has to hold hearings, give notice, take testimony,  
13 issue findings and all these things.

14 They're simply wrong on every single point.

15 Now, first of all, the exact conduct, as the  
16 Supreme Court pointed out in Patrick, does not need to  
17 be reviewed or approved, but it was.

18 And in this case, Your Honor, I would just  
19 like to invite your attention to the handout I gave,  
20 which is Appendix 2 to our Motion to Dismiss. It is the  
21 Commissioner's Order Approving Blue Cross's Provider of  
22 Class Plan. And I would particularly like to direct  
23 your attention, Your Honor, to pages 5 and 15.

24 THE COURT: This is a separate document?

25 MR. HOFFMAN: Yes, this is a separate



1 document. It is titled, Order Issuing Determination  
2 Report, and it was entered on July 8th, 2009.

3 In that Order, Your Honor, on page 5, the  
4 Commissioner specifically describes a Blue Cross Equal  
5 to MFN that are applicable to about half of the hospital  
6 contracts at issue here, the Peer Group 5 Hospitals,  
7 which are largely the rural hospitals.

8 The Department of Justice attempts to brush  
9 the fact that the Commissioner specifically recites the  
10 exact cause they're challenging in the Commissioner's  
11 Order approving Blue Cross's plan.

12 They try to say, oh, well, the Commissioner  
13 wasn't really reviewing anything, he was apparently  
14 asleep at the switch and just wrote this by accident in  
15 the Order.

16 It is an unbelievably dismissive treatment  
17 of the state regulator, but more to the point, it is  
18 just wrong.

19 This is where, if you turn to page 15 of the  
20 same document, what you will see is the Commissioner  
21 describing why he was looking at Blue Cross's  
22 reimbursement mechanism including the Equal-to MFNs.

23 And what he says is that Blue Cross's  
24 reimbursement methodology is designed to be equitable to  
25 ensure and maintain appropriate provider participation

1 levels. Those policies are described on pages 4 and 5  
2 of this Report, which is where he described the MFN.

3 Blue Cross has revised it, and then he  
4 describes all this because he was finding that Blue  
5 Cross complied with its requirement to provide  
6 comprehensive health care access across the State of  
7 Michigan. And one of the tools used to do that was its  
8 reimbursement methodology.

9 THE COURT: You're referring to page 15 of  
10 55 or 15 at the bottom of the page?

11 MR. HOFFMAN: I'm referring to page 15, and  
12 I'm hoping we're looking at the right document here. It  
13 is titled at the top, Order Number 09-019-BC.

14 THE COURT: Mine has across the top the  
15 document number from our Court 153, and then page  
16 number. Are you referring to that page 15 or the page  
17 15 at the bottom right-hand side of the document?

18 MR. HOFFMAN: Got it, Your Honor. Page 15  
19 at the bottom right-hand side.

20 THE COURT: Which starts with, "During  
21 2007".

22 MR. HOFFMAN: Correct. And the paragraph  
23 I'm quoting from here, Your Honor, is the third  
24 paragraph in.

25 THE COURT: Okay.

1                   MR. HOFFMAN: So in other words, Your Honor,  
2 this is not just some one-liner in the report, although  
3 that would plainly suffice, this review was because the  
4 Commissioner's determining Blue Cross's reimbursement  
5 policies were designed to enable it to meet its  
6 requirement to provide comprehensive universal health  
7 care access.

8                   Your Honor, the other documents I provided  
9 to you tell you a number of things, and what I would  
10 invite your attention to specifically are the documents,  
11 and this is Document 12-11 and 12- -- I'm sorry, 12-12  
12 and 12-13.

13                  These are submissions to the Commissioner by  
14 the Michigan Association of Health Plans, a collection  
15 of Blue Cross competitors, specifically challenging in  
16 words that could be quoted from the Department of  
17 Justice's Complaint, all of the Blue Cross MFNs at issue  
18 here, including the ones the Department of Justice calls  
19 Differential MFNs and what I would describe as MFNs that  
20 say Blue Cross gets the lowest terms. And the issues  
21 they raise are exactly the issues raised here.

22                  Now, the Commissioner didn't see fit to act  
23 on that. But that doesn't mean that the Commissioner  
24 was asleep at the switch or not doing his job, as the  
25 Department of Justice would have you believe.

1                   The Department of Justice's position here is  
2 no different than if somebody asked the court for relief  
3 and the court doesn't grant it that somehow the court  
4 didn't do anything.

5                   Now, let me just touch briefly on the timing  
6 of the review.

7                   There is no magical moment. Prospective  
8 review is sufficient.

9                   If you turn, Your Honor, to page 12, and I'm  
10 sorry, Your Honor, I'm going to go back to the handout I  
11 gave out of our presentation. Here, we contrast this  
12 review that the Department of Justice said suffices for  
13 state action in Pennsylvania. And Pennsylvania, as the  
14 Department of Justice said in its briefs, the relevant  
15 statute requires the Commissioner to approve contracts  
16 before they take effect.

17                   And of course, that statute did. But Your  
18 Honor, it didn't require any review of MFN clauses. It  
19 had no requirement that these clauses be addressed in  
20 any order. And there is no evidence that any order ever  
21 even mentioned MFN clauses much less review them at  
22 issue here.

23                   But, as the Department of Justice said then,  
24 correctly, quote, a court would likely rule that the  
25 policy at issue is exempt from federal antitrust

1 scrutiny. There is also no set of particular procedural  
2 requirements that are imposed on state regulators.

3 Now, Your Honor, if you look at the  
4 documents I gave you, and I'm not going to spend time  
5 going through them right now, simply reading them, I  
6 think, will more than suffice to show you that, in fact,  
7 here there were hearings, there was an investigation,  
8 there were public decisions. Every criteria the  
9 Department says is required -- wrongly -- was present.  
10 But also, Your Honor, if you look at page 13 of our  
11 handout, you will see that court after court from the  
12 Supreme Court through the Sixth Circuit on down has said  
13 by the very nature of the state action doctrine, it  
14 imposes no particular procedural straight-jacket on  
15 state regulators that would entrench on the federalism  
16 justification for state action immunity.

17 So that is my third point, Your Honor.  
18 State action, if Blue Cross had to show active  
19 supervision, which it doesn't, it plainly is present  
20 here.

21 Let me turn to abstention, the last point.  
22 Quote, under the Burford doctrine, federal  
23 courts abstaining from deciding cases when there is a  
24 need to defer to complex state administrative  
25 procedures. That is from the McDonald case from the

1 Sixth Circuit in 1999. McDonald versus Village of  
2 Northport.

3 Page 14 of our handout, Your Honor, lays out  
4 the test. There is no dispute about this test. It is  
5 simply that, as the slide illustrates, that courts  
6 sitting in equity -- and that is important -- must  
7 decline to interfere with procedural orders of the state  
8 agencies if there are difficult questions of state law  
9 or if excise of federal review will disrupt state  
10 policy, and that state policy was important.

11 Now, first, Your Honor, health care is  
12 clearly a compelling state interest. The Michigan  
13 Constitution says so. Its statutes say so. The  
14 regulations say so. The Michigan Supreme Court has said  
15 so, as well as other courts. And if you turn to page 15  
16 of our handout, we have collected a whole series of  
17 quotes to this effect.

18 It would be preposterous for the Department  
19 of Justice to come in and argue that providing  
20 comprehensive health care coverage is not a compelling,  
21 overwhelmingly important state interest. And we don't  
22 understand them to take that position here.

23 They do say that, well, there is federal  
24 antitrust interest at stake here, but Your Honor, that  
25 is an irrelevancy.

1 Abstention is granted in antitrust cases,  
2 and moreover, what you should focus on in connection  
3 with this issue is what is the relief they're seeking?  
4 The relief they're seeking is that Blue Cross be ordered  
5 not to enter into MFNs. That relief could be granted by  
6 the Commissioner or by Michigan courts, and there is no  
7 argument to the contrary.

8 So all the relief that the Department of  
9 Justice seeks could be afforded by Michigan, which would  
10 be the appropriate avenue for that to occur. There is  
11 no compelling federal interest in obtaining anything  
12 other than what Michigan could provide.

13 Now, the Department says, well, we can't  
14 bring, we the Department of Justice, can't bring a  
15 federal antitrust case in state court review, or in  
16 state court. They don't challenge that there is plenty  
17 of avenues for state court review of Blue Cross's  
18 conduct or even the Commissioner's Orders, they simply  
19 say they can't bring an antitrust case in state court.

20 That is an irrelevancy.

21 As the Sixth Circuit said, quote:

22 "Abstention from exercise of federal  
23 jurisdiction is not improper simply because  
24 the United States is the party seeking a  
25 federal forum." Closed quote.

1 That is U.S. versus Ohio, 614 F.2d 101.

2 The court went on to say:

3 "The presence of the United States as a  
4 party to the district court proceeding is  
5 irrelevant to the issue of applicability of  
6 federal abstention doctrine."

7 And in fact, Your Honor, as stated in the  
8 Burford case itself, where the Supreme Court recognized  
9 that the defining issue in equity cases is can the same  
10 relief be given in the state proceedings. And that is  
11 not challenged here.

12 The remainder of the Burford test is are  
13 there difficult questions of state law and would federal  
14 review disrupt coherent state policy.

15 And on that point, Your Honor, I think we  
16 have pretty much covered it.

17 Let me just go back to where I began.

18 THE COURT: Briefly.

19 MR. HOFFMAN: If you look at page 16, we  
20 quote again the Michigan Chiropractic case, which  
21 explains why this kind of review is disruptive. And we  
22 quote also from the Accident Fund case from the Western  
23 District of Michigan where the Court abstained under  
24 Burford from a review of the Commissioner's regulation  
25 of worker's compensation insurance because of a



1 disruptive effect of federal review on state insurance  
2 as administered by the Insurance Commissioner.

3 Your Honor, this case poses a challenge to  
4 and a threat to Michigan's health care system. Blue  
5 Cross is Michigan's insurer of last resort. It is  
6 charged by the state with providing health care service  
7 everywhere in the state to everyone in the state, sick  
8 or healthy, rural/urban, profitable or unprofitable.

9 If Blue Cross can't insure that it is paying  
10 less than commercial competitors who bear no such  
11 burden, their competitors could cherry-pick away Blue  
12 Cross's profitable insurers, which would drive Blue  
13 Cross's costs up, and threaten Michigan's successful  
14 health care system. Thank you.

15 MR. STENERSON: Good afternoon, Your Honor.  
16 Todd Stenerson on behalf of Blue Cross Blue Shield of  
17 Michigan. I will address the pleading deficiencies in  
18 the Government's Complaint.

19 First, Your Honor, I think it is important  
20 to step back and talk about what is at heart of the  
21 dispute here between the Department of Justice and Blue  
22 Cross, and that is Most Favored Nation clauses that are  
23 contained in hospital reimbursement contracts.

24 And the Complaint that was filed here, Your  
25 Honor, followed a several-year, over two different

1 investigations that the Government did of Blue Cross  
2 pre-filing.

3           The Government here had hundreds of  
4 thousands of pages of Blue Cross materials, subpoenaed a  
5 number of -- dozens of third parties, and it had  
6 substantial facts at its disposal.

7           Yet, it recognizes that the use of MFN  
8 clauses are ubiquitous in the economy. In fact, the  
9 U.S. Government and the State of Michigan uses MFN  
10 clauses.

11           Because of the frequency of their use, the  
12 Government recognizes, as it must, that an antitrust  
13 violation can only be found here and pled here if they  
14 violate what is called the so-called Rule of Reason.

15           Under the Rule of Reason, Your Honor, the  
16 Government challenges the Blue Cross MFN under Section 1  
17 of the Sherman Act. And in order to do so, it must  
18 plead a number of material elements, including the  
19 claimed illegal conduct; the relevant product market at  
20 issue; the relevant geographic market at issue; the  
21 market share of Blue Cross in those markets; and  
22 finally, the anticompetitive effect in the relevant  
23 markets.

24           On a motion to dismiss, Your Honor, simply  
25 the pleading that the existence of MFNs operate as

1 written does not survive a motion to dismiss.

2 In fact, this Court in Blue Cross Blue  
3 Shield versus Michigan Association of Psychotherapy  
4 Clinics 1980 West Law 1848, Eastern District of Michigan  
5 in 1980, held that MFNs do not create price forms. It  
6 is not a form of price fixing. And that is this Court's  
7 own prior ruling.

8 With that backdrop, Your Honor, it is clear  
9 that the Complaint here does not allege sufficient facts  
10 to plausibly state a claim under both Supreme Court and  
11 Sixth Circuit authority.

12 And I would invite Your Honor to  
13 specifically look at Twombly versus Bell Atlantic, 2007  
14 Supreme Court; Weyerhaeuser versus Ross-Simmons, 2007  
15 Supreme Court; and the Sixth Circuit's own opinion in  
16 Total Benefits Planning Agency -- And I'm on page 18 of  
17 the slideshow -- in which the Sixth Circuit says the  
18 Supreme Court requires plaintiffs to identify the  
19 relevant product and geographic markets so the district  
20 court can assess what the area of competition is and  
21 whether the alleged unlawful acts have anticompetitive  
22 effects in the market.

23 So here, what does the Government allege?  
24 Or more importantly, what do they fail to allege?

25 And Your Honor, Blue Cross submits that the

1 Complaint here fails to plausibly allege product market.  
2 It fails to plausibly allege geographic market. And it  
3 fails to plausibly allege Blue Cross's market shares in  
4 those markets.

5 Each one of those failures is an independent  
6 reason upon which the Complaint should be dismissed here  
7 today.

8 THE COURT: If I find that they fail to do  
9 that, why wouldn't I just allow them to amend to do  
10 that?

11 MR. STENERSON: That is a possibility, Your  
12 Honor; however, if they were to do that, they would have  
13 to meet the required standards to do that. And as  
14 hopefully will become clear, the scope of the markets at  
15 issue, both product and geographic, are critical to  
16 assessing both the outcome of the case, Blue Cross's  
17 defense of the conduct, as well as the discovery that  
18 would be appropriate and relevant to both prosecute and  
19 defend the case.

20 So these pleading deficiencies are not  
21 merely technicalities, they are critical to define the  
22 appropriate path of the case if it were to survive past  
23 a motion to dismiss.

24 And in that regard, the Government seeks to  
25 allege two product markets. The first is group health

1 insurance. The second is individual health insurance.

2 And then they plead 17 different geographic  
3 markets. Those geographic markets, Your Honor, are as  
4 disparate as St. Joseph County, which comprises of a 521  
5 square mile area, all the way to the Upper Peninsula,  
6 the area of which comprises 28,093 miles.

7 And in each of the 17 markets they have  
8 tried to plead here, there is a different configuration  
9 of size; there is a different configuration of  
10 hospitals; there is a different configuration of  
11 hospitals with MFNs and without MFNs, et cetera. Yet,  
12 the only fact that the Government pleads to support  
13 those different market definitions is that people want  
14 health care close to their home or work. And in a  
15 moment, I will go into more detail on that, but I would  
16 like to go back to the product market specifically,  
17 because as I mentioned at the outset, the conduct that  
18 is at issue here is in negotiations between Blue Cross  
19 and hospitals. It is not in markets for the sale of  
20 health insurance.

21 And that is critical because on the product  
22 market front, the Complaint says nothing about who  
23 participates in the market for hospitals buying hospital  
24 services and who the competitors are in the various  
25 aspects of that.

1                   And that is not an oversight, Your Honor, I  
2     submit, that the Government is unaware.

3                   One of the documents that was put up to Your  
4     Honor at the beginning of the hearing is a Complaint  
5     that was filed on February 25th, 2011 by the Department  
6     of Justice. That Complaint, Your Honor --

7                   THE COURT: Is this one of the things that  
8     you added up here?

9                   MR. STENERSON: Yes, Your Honor.

10                  THE COURT: And it is which one?

11                  MR. STENERSON: United States of America and  
12     state of Texas.

13                  THE COURT: What does it say at the top?

14                  MR. STENERSON: It is a Complaint, Your  
15     Honor.

16                  THE COURT: It is document 12-13?

17                  MR. STENERSON: May I approach and pass  
18     another one?

19                  THE COURT: Okay, I have it. I had it  
20     anyway, but it looked like something different.

21                  MR. STENERSON: Your Honor, in this  
22     Complaint, which was filed after the briefing in this  
23     case was completed, the Department of Justice, many of  
24     these same lawyers, sued a hospital in Texas over its  
25     contracting policies with insurers, including the Blue

1 Cross entity in Texas. And in it, in excruciating  
2 detail in paragraph 10 to paragraph 20, it explains how  
3 the conduct that they're attacking is in the markets for  
4 purchasing hospital services.

5 THE COURT: This is where, paragraph what?

6 MR. STENERSON: Paragraphs 10 to 20.

7 THE COURT: Okay.

8 MR. STENERSON: The point is the Department  
9 of Justice understands the markets at issue, and for  
10 whatever reason, they did not plead them here. That it  
11 fatal. Because without the proper product definition,  
12 the Court, as the Sixth Circuit said in Total Benefits,  
13 cannot even begin to assess whether or not this conduct  
14 is subject to antitrust scrutiny.

15 THE COURT: What do you mean when you saw it  
16 is fatal?

17 MR. STENERSON: It requires dismissal.

18 THE COURT: Okay.

19 MR. STENERSON: And --

20 THE COURT: Rather than permitting them to  
21 amend?

22 MR. STENERSON: Your Honor, it would be one  
23 option would be to dismiss without prejudice under  
24 Twombly. That would be an option, although I don't know  
25 that is required given the extensive pre-filing

1 investigation that the Government had.

2 THE COURT: I'm not sure I understand your  
3 answer. Is your answer no, you don't think they should  
4 be allowed to amend?

5 MR. STENERSON: It would be my preference to  
6 not allow --

7 THE COURT: And why would that be? Why  
8 would I allow them not to amend?

9 MR. STENERSON: It is certainly within your  
10 discretion to allow them to amend, Your Honor.

11 THE COURT: But what I'm asking you is why  
12 do you think I shouldn't do that? If I should find it  
13 is not enough.

14 MR. STENERSON: I don't think you should not  
15 allow them permission to amend, Your Honor, I do believe  
16 that if an order is issued without prejudice, it should  
17 include instructions to meet the appropriate pleading  
18 standards of the Sixth Circuit and the Supreme Court.

19 THE COURT: Okay.

20 MR. STENERSON: So the failure to plead a  
21 product market sufficiently, Your Honor, will permit  
22 dismissal, but furthermore, the failure to plead a  
23 geographic market here also leads to dismissal.

24 Your Honor, if I could approach the boards  
25 over here?



1 THE COURT: You may.

2 MR. STENERSON: Now, Your Honor, as I  
3 mentioned, there are 17 different geographic markets  
4 alleged in the Complaint, one of the largest of which is  
5 the Detroit MSA area, which is on this map here. And in  
6 that area, Your Honor, there are 40 hospitals there in  
7 operation. Only 10 of them have MFN clauses, and the  
8 surface area of that geographic location is over 4,000  
9 square miles.

10 Now, the Complaint alleges a single fact,  
11 and I would submit to you it may not even be a fact  
12 itself, and that is the Government attempts to draw the  
13 geographic boundary around the Detroit MSA on the simple  
14 fact that people want health care by their home or their  
15 work. That is the sole fact upon which each and every  
16 geographic market pled rests upon.

17 Yet, there is no attempt to explain why some  
18 are big or small, all based on the same single fact.

19 THE COURT: Why some, meaning some what?  
20 Why some are big or small?

21 MR. STENERSON: Correct, Your Honor.

22 THE COURT: Some what, though?

23 MR. STENERSON: Oh, I'm sorry, the outer  
24 boundaries of the geographic market.

25 THE COURT: Of the 17?

1 MR. STENERSON: Correct.

2 So for example, in Metro Detroit it is this  
3 line here (indicating) is the outer boundary. We drew a  
4 60 mile radius circle to show you that under the  
5 Government's theory, all the hospitals within this area  
6 claim to compete with one another, which means someone  
7 in Farmington Hills would willingly drive 60 miles to a  
8 hospital in Port Huron for care. Yet, if you go to the  
9 west, somebody from Farmington Hills or for that matter  
10 Downtown Detroit here from the courthouse would not be  
11 willing to drive to Ann Arbor to one of the most  
12 prominent hospitals in the Country to get medical care  
13 at the University of Michigan Medical Center in Ann  
14 Arbor.

15 THE COURT: Why isn't it that you just  
16 disagree with their 17 areas versus they're not the  
17 proper 17 areas?

18 MR. STENERSON: Because the purpose of  
19 pleading is to say if the fact pled is true is the  
20 conclusion derived from that pled fact support the  
21 boundary of the market. And the only fact in the  
22 Complaint is that people want health care service close  
23 to their home or work.

24 So in discovery, if the Government were to  
25 prove that that is a true fact, and again, I would

1 submit that is not a fact, that does not inform the  
2 Court to draw the boundaries where they are drawn.

3           There is no rational relationship between  
4 the fact alleged and the conclusion that the Government  
5 is seeking to establish.

6           And therefore, discovery would be  
7 meaningless because we would simply try to establish  
8 whether that fact is true. But even if it were, it is  
9 both insufficient to draw the boundary and inconsistent  
10 with the boundary.

11           For example, Your Honor, if we move to the  
12 west, if we move out of Southeastern Michigan and we go  
13 to the Grand Rapids area, now, we're using the same 60  
14 mile radius here because that's the area that would  
15 allow patients to go to hospitals within the Detroit  
16 boundaries.

17           In the 60 mile radius on the west side of  
18 the State, you have one, two, three, four, five, parts  
19 of six different markets, again, the line, the outer  
20 boundaries of which the Government tries to establish  
21 with a simple proposition that people want health care  
22 by their home or work.

23           Yet, it suggests that while somebody in  
24 Farmington Hills would drive 60 miles to Port Huron, no  
25 one from Kalamazoo would drive 60 miles to Grand Rapids.

1 And nobody from Lansing would drive 60 miles to Grand  
2 Rapids.

3 So in other words, under the Government's  
4 theory, these hospitals here (indicating) do not compete  
5 with the hospitals in Grand Rapids; yet, the hospital in  
6 Port Huron competes with Beaumont Hospital in Farmington  
7 Hills.

8 And because there is 17 different markets  
9 encompassing, in the Government's own words, two  
10 different product markets, the Government is trying to  
11 establish 34 completely separate and independent  
12 antitrust violations that Blue Cross has to defend  
13 itself against. And Blue Cross cannot begin to defend  
14 itself about what was wrong with MFNs in these  
15 independent markets without adequate pleading.

16 And not to mention, Your Honor, it says  
17 nothing about the common sense outcome that if I have  
18 the need for cancer treatment or cardiac care or my wife  
19 is going to have a baby, where are we going to go for  
20 service?

21 A couple of months ago, Your Honor, when my  
22 little girl had a heart condition, I didn't look for the  
23 hospital that was closest, I looked for the best.

24 There is nothing in the Government's sole  
25 allegation where it attempts to draw these arbitrary

1 lines, these arbitrary and unsupportable boundaries that  
2 even begin to meet its burden of an antitrust market.

3 There is just simply no relationship between  
4 the single fact of people want health care where they  
5 work or live and where these boundaries are drawn.

6 Specifically, Your Honor, in Todd versus  
7 Exxon, a Second Circuit case that the Government itself  
8 relies upon, the Court said cases in which dismissal on  
9 the pleadings is appropriate frequently involve failure  
10 even to attempt a plausible explanation as to why a  
11 market should be limited in a particular way.

12 And we submit, Your Honor, here there is no  
13 plausible reason why these lines, these geographic  
14 boundaries are to be drawn the way they are.

15 And that is fatal, because when it comes to  
16 the question of did the conduct at issue here, again  
17 under the Rule of Reason, did the MFNs have some sort of  
18 anticompetitive effect, the Court, under Total Benefits,  
19 needs to look at a combined analysis of the product  
20 market, the conduct at issue and the geographic location  
21 in which that conduct occurred in order to determine  
22 whether there was harm to competition.

23 You know, the Complaint talks about certain  
24 competitors in certain markets, and it says Competitor X  
25 paid more at Hospital Y. That is not harm to

1 competition. And without the starting point, without  
2 the proper allegations, fact allegations, that if true,  
3 would establish the boundary, it fails from the outset.

4 Now, any more questions on the map, Your  
5 Honor?

6 THE COURT: No, thank you.

7 MR. STENERSON: Now, Your Honor, moving to  
8 --

9 THE COURT: One second.

10 MR. STENERSON: Sure.

11 THE COURT: I'm sorry, you may proceed,  
12 Counsel.

13 MR. STENERSON: So I've established that the  
14 Government has failed to properly plead a fraud market.  
15 That is an independent ground for dismissal. They've  
16 failed to adequately plead a geographic market. That is  
17 an independent ground for dismissal.

18 And now specifically talking about the MFNs  
19 themselves, and as I mentioned, without the first two  
20 elements, you can't even begin to judge the MFN conduct  
21 and whether or not it is susceptible to an antitrust  
22 challenge.

23 But even apart from that, you have to start  
24 this case, we submit, from the backdrop that in a case  
25 like this, the Supreme Court in Twombly has established

1 that you need to plead a plausible violation of the  
2 antitrust laws.

3 And in this case, MFNs are being attacked  
4 directly. And MFNs on their face are discounts. They  
5 are a way a firm like Blue Cross seeks low prices.

6 Blue Cross wants and seeks the best prices  
7 for its insurers, and in its arms-length negotiations  
8 with hospitals, it seeks to keep costs down. That is  
9 what it tries to do.

10 The MFN is a mechanism in which it can help  
11 seek low prices, and the Supreme Court has repeatedly  
12 recognized that the federal court should be especially  
13 suspect of challenges to discounting practices and to  
14 price competition. And it is upon that backdrop that  
15 the Government needs to meet the plausibility threshold  
16 of Twombly, and we submit that here they do not do so.

17 Now, in particular, what the Government  
18 tries to say as to why the MFNs are an improper practice  
19 is they say, well, they foreclose Blue Cross's  
20 competitors from competing with Blue Cross. And Your  
21 Honor, I submit they do not.

22 Foreclosure under antitrust law is a concept  
23 where a firm enters into an exclusive dealing contract  
24 with the supplier so none of its competitors can also  
25 contract with it.

1                   So what would that be an example of here?  
2       That would be an example of Blue Cross going to one or  
3       several hospitals, but let's just use one as an example,  
4       and say to them, I will pay you for reimbursement costs  
5       but I want an exclusive. I want to be the only insurer  
6       in the State that has a reimbursement contract with you,  
7       and everybody else should be blocked out.

8                   In that situation, the competitors don't  
9       have access to that hospital because of the exclusive  
10      agreement.

11                  That is not what is alleged here. And by  
12      the way, I would submit to you that even if the  
13      exclusion was as stark as I just described, there is  
14      nothing inherently wrong with such a contract. And  
15      there is no reason to believe that such a contract would  
16      raise rates of insurance to other people.

17                  In other words, it is perfectly plausible if  
18      a firm were to do that, they would use their exclusive  
19      contract with a particular hospital to go out and market  
20      to get insureds to say, look, you want to go to this  
21      hospital, you need to come buy insurance from me because  
22      I will give you access. And then the other insurance  
23      companies can go and compete and get the deals with  
24      whatever hospitals they want.

25                  The point is that MFNs, even when you're



1 looking at a complete exclusive agreement, don't and  
2 can't have that effect on their face, because on their  
3 face, the most they do is guarantee that Blue Cross gets  
4 the lowest price. That is it. They don't foreclose any  
5 competitor from contracting with a hospital. Every  
6 competing insurer in the State has the ability to go and  
7 contract with every hospital in the State, and they can  
8 have an arms-length negotiation to do that.

9 And with regard to foreclosure or harm to  
10 competitors, the Complaint is replete with conclusory  
11 allegations about foreclosure or how competitors can't  
12 compete, but they do not allege in any sufficient detail  
13 the names of the competitors, who else is in the  
14 markets, what is happening in the markets. And that, we  
15 submit, Your Honor, is another basis for --

16 THE COURT: What do you mean what is  
17 happening in the market?

18 MR. STENERSON: Well, for example, if you  
19 look at the map, Your Honor -- if I may approach?

20 THE COURT: You may.

21 MR. STENERSON: In Flint, again we dispute  
22 the boundary that they try to place, but using their  
23 current pleading, there are three hospitals, only one of  
24 which has an MFN. So for example, in Flint, they don't  
25 say who all the hospitals are. They don't say who all

1 the potential insurers are. They don't say which  
2 insurers have reimbursement contracts. They don't say  
3 what is the percentage of HMO patients versus PPO  
4 patients. They don't do any of the things that Total  
5 Benefits say is required in a Rule of Reason case.

6 And that is something that they have to do  
7 for each and every separate market that they allege.  
8 They don't have to do it once. They can't plead by  
9 example. They need to do it for every claim.  
10 Otherwise, the result would be a blunderbuss discovery  
11 plan covering the entire State with no specificity. And  
12 more importantly, you know, go back to the pleading  
13 requirements, there is no facts in the Complaint that if  
14 true would support a violation.

15 So again, it is more than a pleading  
16 deficiency, it is about the scope of the entire case,  
17 and that's why it is so important.

18 THE COURT: Well, it is not a pleading  
19 deficiency, isn't that what you're alleging that they  
20 pled deficiently?

21 MR. STENERSON: Well, what I meant by that  
22 --

23 THE COURT: You don't want me to decide the  
24 merits at this point, right?

25 MR. STENERSON: No, that is correct, Your

1 Honor.

2 So when you step back and look at the  
3 conduct, and as I explained, you know, these MFNs don't  
4 foreclose anybody, at best it just means that Blue Cross  
5 gets the lowest price.

6 THE COURT: So they foreclose people from  
7 getting the lowest price?

8 MR. STENERSON: No, they do not foreclose  
9 people from getting the lowest price.

10 THE COURT: Well, they can't get the same  
11 price as Blue Cross, right?

12 MR. STENERSON: On the Equal-to MFNs they  
13 can get the same price; with the Differentials, Blue  
14 Cross gets the best price.

15 But that construct, that allegation really  
16 falls into the Supreme Court's decision in Weyerhaeuser,  
17 and we briefed this in our opening brief, Your Honor,  
18 and said that when the Government alleges that Blue  
19 Cross overpaid a hospital; i.e., paid more than it  
20 needed to for its reimbursement contract, it cannot  
21 survive an antitrust challenge unless it also shows that  
22 Blue Cross could recoup the monies that it overpaid.

23 And why is that? Well, because under  
24 antitrust law, if a scheme alleged in a complaint does  
25 not make economic sense, the courts dismiss them. And I

1 would submit to you that it doesn't make economic sense  
2 that Blue Cross would knowingly overpay for MFNs unless  
3 it also had a scheme to recoup any such overpayments.

4           Now in response to that, the Government  
5 says, Blue Cross, you misunderstood, we're not alleging  
6 you overpaid for all the MFNs, and because we have not  
7 alleged you have overpaid, we don't need to show  
8 recoupment. So they admit that they cannot meet the  
9 test in Weyerhaeuser, but the critical point to that is  
10 if they are now retreating and withdrawing their  
11 allegation that Blue Cross overpaid, that simply means  
12 that Blue Cross got the best price. And seeking the  
13 best price, under Ocean State, First Circuit case, which  
14 is in our brief, is, as a matter of law, not an  
15 antitrust violation. So they can't have it both ways.

16           Now, in order to overcome this, they rely on  
17 two cases primarily. Delta Dental is the first. A  
18 couple of things about Delta Dental.

19           First, Delta Dental is a District Court in  
20 Rhode Island decision. It was pre-Twombly. It was  
21 pre-Weyerhaeuser, and it was not required to follow  
22 Sixth Circuit precedence in Total Benefits.

23           But equally important, Delta Dental was a  
24 single count of a single market of the State of Rhode  
25 Island, the size of which was a thousand square miles

1 with a million people. In other words, it was one  
2 antitrust count that survived a motion to dismiss  
3 pre-Twombly.

4 Here, you have 34 separate and independent  
5 counts, only one of which, you know, the Detroit MSA is  
6 four times the size of the market that was at issue in  
7 Delta Dental. It simply does not control and does not  
8 inform the Court in this case.

9 The last case they rely on is Dentsply. I  
10 submit they miscite Dentsply. Dentsply is 189, 190 and  
11 talks about the exclusive contracts at issue and the  
12 complete blocking of competitors.

13 As I have explained, MFNs don't completely  
14 block anyone. That case is inapposite.

15 This case is exactly the type of failure  
16 that Twombly teaches against and should not take for  
17 discovery because it would potentially create an  
18 incorrect effect. And as the Supreme Court said, given  
19 the limited success of judicial supervision in checking  
20 discovery abuse, and the threat that discovery expense  
21 will push cost-conscious defendants to settle even  
22 anemic cases before reaching a proceeding, federal  
23 courts have been reasonably aggressive in weeding out  
24 meritless antitrust claims at the pleading stage.

25 And as the Sixth Circuit said in Nicsand

1 quoting the Supreme Court, and in Nicsand, Your Honor,  
2 if you get a chance to review it, it is an extensive  
3 review of contracts, and the Sixth Circuit had no  
4 problem affirming dismissal at the pleading stage.

5 THE COURT: Okay, thank you.

6 MR. WAYLAND: Good afternoon, Your Honor.  
7 May it please the Court, I'm Joseph Wayland, Deputy  
8 Assistant Attorney General for the United States.

9 I listened to Mr. Hoffman, and he started by  
10 saying our case is a, quote, direct attack of Michigan's  
11 health care system. And he said we were interfering  
12 with Michigan's ability to provide health care.

13 THE COURT: Okay, use the mic so we can all  
14 hear you.

15 MR. WAYLAND: As I said, Your Honor, Mr.  
16 Hoffman began by asserting that our case is a, quote,  
17 direct attack on Michigan's health care system. And  
18 our case interferes with the provisions of health care  
19 in Michigan.

20 And I listened very carefully throughout his  
21 entire presentation and his Colleague's presentation,  
22 and I heard not one fact that tells us how the  
23 Government's prosecution of an MFN clause that we allege  
24 results in higher prices could possibly, could possibly  
25 be construed by anybody as an attack on any state's

1 health care system.

2           The attack on Michigan's health care system  
3 are agreements that artificially raise prices and  
4 prevent consumers in this State from getting the best  
5 health care they can at the best prices. That is the  
6 attack on health care system.

7           Simply put, Your Honor, the Complaint filed  
8 by the United States and the State of Michigan alleges  
9 in substantial detail that Blue Cross's Most Favored  
10 Nation clauses have the effect of raising prices and  
11 reducing competition in local markets throughout  
12 Michigan for individual and group commercial health  
13 insurance.

14           These allegations state a clear violation of  
15 Section 1 of the Sherman Act which forbids agreements  
16 that unreasonably restrains trade.

17           Blue Cross never comes to grips with the  
18 fundamental allegation that the MFNs at issue here raise  
19 prices and reduce competition. Indeed, Blue Cross  
20 never says that an agreement that has the effect of  
21 raising prices and reducing competition, as we allege,  
22 does not state a claim under Section 1.

23           Instead, Your Honor, Blue Cross, in essence,  
24 ignores the allegations regarding anticompetitive effect  
25 and offers an alternative world view. And their world

1 view is that Blue Cross is only acting in the public  
2 interest and is attempting to, quote, obtain the best  
3 possible prices from hospitals.

4 Blue Cross, of course, will have the  
5 opportunity to tell its story and challenge the  
6 allegations in the Complaint at trial. But its  
7 assertions about its mission and whether its contracts  
8 result in lower prices provide no basis to dismiss this  
9 Complaint.

10 Nor does the state action doctrine provide  
11 any basis to dismiss this Complaint, and I will address  
12 that in more detail, but I want to make that fundamental  
13 point at the beginning.

14 Blue Cross claims that Michigan's general  
15 regulatory scheme cloaks its contracting practices with  
16 state action exemption. But even if a general  
17 regulatory scheme were sufficient to provide such an  
18 exemption -- and it is not -- the Michigan regulatory  
19 scheme cannot under any rational reading be understood  
20 to immunize contracts that have the effect, as alleged  
21 in the Complaint, of raising costs. For one of the  
22 principle purposes of the scheme, as even Blue Cross  
23 admits in its papers, is to lower costs.

24 Indeed, the State itself, through the  
25 Attorney General, has joined this action and has



1 expressly stated that it agrees with the United States  
2 that Blue Cross is not entitled to state action  
3 exemption.

4           Thus, there is no basis for the assertion  
5 that the United States has usurped the state of  
6 Michigan's authority. Michigan is sitting at the table  
7 with us, they have alleged the same anticompetitive  
8 harm, Your Honor.

9           Your Honor, I handed up a presentation, and  
10 I also have it on the board here, and we have  
11 distributed it to Counsel as well.

12           Three fundamental points, Your Honor.  
13 Michigan's policy favors lower health care costs, and  
14 the MFNs, which we allege raise costs, are not  
15 consistent with that.

16           Federal courts do not abstain from hearing  
17 federal claims brought by the United States. I'm not  
18 going to spend any time on that. That is the Burford  
19 issue, Your Honor. I don't think there is any basis for  
20 it. It is a radical interpretation and I don't think  
21 any court has stopped the United States from asserting  
22 federal claims.

23           Next, the Complaint plausibly alleges an  
24 antitrust violation. I think our disagreement with the  
25 Defendant at this point, Your Honor, is Twombly is

1   plausibility not indisputability, and that is really  
2   what we heard from the Defendants.

3                   Let's look, Your Honor, at what these  
4   agreements are all about. They're two kinds of  
5   agreements that we allege in the Complaint. There's  
6   MFN Plus agreements, and under MFN Plus agreements, Your  
7   Honor, the health care provider agrees that Blue Cross's  
8   competitors have to pay more money. It is as simple as  
9   that. Competitors have to pay more money. And  
10   sometimes it is lot more money.

11                   If you look at the Covenant example, it is  
12   nearly 40 percent more. Beaumont, a big Detroit  
13   Hospital, more than 20 percent more, on down to  
14   Ascension Health. That is what MFN Plus contracts are  
15   about.

16                   Let's see how they actually work in practice  
17   and find out really where the attack on Michigan's  
18   health care system is.

19                   So on the chart we put up, Your Honor, on  
20   the left axis, that is the percentage charges paid to  
21   hospitals by the insurer.

22                   Typically, the way this works, Your Honor,  
23   the hospital has a charge card that it has and an  
24   insured gets a discount off that. And the number down  
25   on the left-hand side represents that discount.

1                   And the first set of bars that we have on  
2     the left side of the graph, Your Honor, shows what  
3     happens without an MFN.

4                   Blue Cross is free to negotiate whatever  
5     rate it wants. If it can get a lower rate than its  
6     competitors, that is terrific. We're not challenging  
7     the ability of Blue Cross to go out and negotiate a rate  
8     and it may wind up with a lower rate for whatever reason  
9     the competitive market allows. That's okay. But what  
10    the MFN Plus does, Your Honor, as you will see, and we  
11    have assumed here that there is 20 point differential.  
12    That is, there is agreement between the provider and  
13    Blue Cross that says Blue Cross gets a 20 point spread.

14                  What that means is competitors that were  
15    willing to charge less are forced up. Raising the  
16    prices. And even more perniciously, as we have alleged,  
17    Your Honor, Blue Cross is willing to pay more to get  
18    that advantage.

19                  So this is not an attack on Blue Cross's  
20    health system for us to challenge, which is on the right  
21    side of the graph, we want to restore competition, what  
22    is on the left side. The attack is on the right side.  
23    That is Blue Cross's attack on free market in Michigan.

24                  Let's talk about the MFN Equal-tos. Same  
25    kind of graph.

1                   On the left side, it is the discounts that  
2   are provided. Before the MFN clause, Blue Cross says a  
3   75 percent discount and some competitors negotiated  
4   something lower. Blue Cross then enters into this  
5   Equal-to MFN, which raises its rivals costs up to the  
6   same level as Blue Cross. And that hatch point is harm.  
7   That is raised prices, Your Honor. That is not lower  
8   prices for Blue Cross, that is higher prices for its  
9   competitors.

10                  Then you wonder why does this work? Why  
11   isn't it the fact that Blue Cross can't be forced down  
12   to the level of the lowest competitor? Well, the  
13   hospital doesn't want to give up the extra money that  
14   Blue Cross is willing to pay. That is the hatched area  
15   on the far right, Your Honor. That is the premium that  
16   the hospital is extracting above what a free market  
17   price might set.

18                  So those are the two clauses we're talking  
19   about. I think we can almost stop here, Your Honor,  
20   because I think it is clear that we have alleged that  
21   these clauses cause harm raising prices and excluding  
22   competition.

23                  Let me turn to the state action argument in  
24   a little more detail.

25                  The Parties agree on the general analytical

1 framework for assessing state action, the two-part  
2 concept.

3           The first part has to do with has the state  
4 legislature articulated a clear and affirmative policy?  
5 There are two subparts to that. Whether done expressly;  
6 if not, was it the logical and foreseeable result of the  
7 legislation. And you have to get through that. That is  
8 a barrier. If you can't get through that, you never get  
9 to the second test, which is if the policy is clearly  
10 articulated, has the state actively supervised the  
11 anticompetitive act.

12           As I think we have argued persuasively, Your  
13 Honor, Blue Cross can't meet the first test. They  
14 can't show that this is a clear articulated policy;  
15 therefore, you should never have to reach the second  
16 test.

17           So what we agree on the framework, Blue  
18 Cross's application of the framework begins by  
19 misstating its burden and then builds its argument on  
20 exactly the wrong legal standard.

21           Both Blue Cross's proposed burden and its  
22 standards have been rejected by the Supreme Court and  
23 the Court of Appeals for the Sixth Circuit.

24           Blue Cross said this is a low hurdle state  
25 action doctrine, geez, we will walk in and we will get

1 it. The Supreme Court said, no, no, disfavor is  
2 required, and it is a rigorous application. The Court  
3 doesn't like this doctrine.

4 Sixth Circuit, narrowly construed. Devaugh.  
5 Missing from their brief, Your Honor. It is the leading  
6 case on this point, and it is missing from their opening  
7 brief.

8 With respect to applicable legal standard,  
9 as I said earlier, Blue Cross alleges essentially that  
10 general regulatory system is sufficient.

11 You know, they said we can't point to a case  
12 that isn't. There actually is not a single case that  
13 holds that a general regulatory system, as they have  
14 alleged here, is sufficient to meet the state action  
15 doctrine. Not one. Not a single one.

16 And there is a reason for that, because the  
17 leading case, which they didn't cite in their opening  
18 brief, says grants of general or mutual authority will  
19 not satisfy a clear articulation component of the state  
20 action exemption. Will not. Sixth Circuit. Right on  
21 point. Not cited in their briefs.

22 And the Supreme Court decision in Ticor,  
23 Defendants must show particular anticompetitive  
24 mechanisms operate because of a deliberate and intended  
25 state policy. Supreme Court. This is critical, Your

1 Honor. This is a critical phrase: Particular  
2 anticompetitive mechanism.

3 And in this case, that's the MFNs operate  
4 because of a deliberate and intended state policy.  
5 That is the standard.

6 Now, in attempting to meet the standard,  
7 Your Honor, Blue Cross points to no specific provision  
8 of any law or regulation that clearly articulates the  
9 State's intention to exempt MFN clauses from antitrust  
10 scrutiny. Instead, Blue Cross points to a hodge-podge  
11 of statutory provisions, court opinions and regulations  
12 that provide general policy guidance. This doesn't  
13 satisfy the burden. They must point to something  
14 specific.

15 The cases they cite on their behalf make  
16 this clear. Those cases fall into two categories  
17 essentially, Your Honor. Cases where there is either a  
18 specific provision expressly authorizing the conduct in  
19 question or an expressed statement of general immunity.  
20 That is how the cases break down.

21 An example of the first set are the rate  
22 setting cases of Southern Motors that they cite. That  
23 is where a state or federal government sets up an entity  
24 to prescribe rates for trucking. That clearly displaces  
25 rate competition. And that is direct.

1                   A second example of or an example of the  
2   second approach is Jackson Hospital, which they also  
3   cite, and in Jackson Hospital, there is an expressed  
4   provision permitting the hospital to act irregardless of  
5   the effect on competition. It is a free pass, and it is  
6   expressed. Free pass. Expressed.

7                   We don't have a free pass here, and we don't  
8   have any specific conduct approval by the state.

9                   Let's say a word about Hallie, which they  
10   rely on substantially, Your Honor. That is a case  
11   involving the authorization by the state for a local  
12   municipality to build a sewer system, and with that  
13   authorization came the freedom expressed by the state  
14   that it would have -- the municipality would have no  
15   obligation to provide service beyond its limits.  
16   That's expressed. You can go out and build a sewer, but  
17   you don't have to build it for your neighbors. When  
18   neighboring municipalities brought an antitrust claim,  
19   the Court said yes, that is the foreseeable result.  
20   When you say you don't have to provide this, when  
21   somebody shows up, you don't have to do it. That is  
22   the kind of expressed intent that the court was talking  
23   about.

24                   So all these cases show that you need to  
25   point to a specific provision directed to their practice



1 at issue which specifically permits conduct to occur  
2 without regard to a particular fact. Blue Cross doesn't  
3 do that.

4 Okay, so even if they could rely on general  
5 provisions, Your Honor, which they can't, the Michigan  
6 regulatory scheme simply does not displace competition.

7 That is the word they all use, displace  
8 competition. I can't find that word anywhere in any  
9 statute or regulation.

10 To the contrary, the Michigan scheme seeks  
11 to encourage competition where possible and to ensure  
12 lowest possible costs.

13 At pages 27 and 28 of our brief, we have  
14 identified numerous provisions of the Michigan  
15 regulatory scheme showing that the Legislature truly did  
16 intend to encourage competition. We have some of them  
17 on the board, I am not going to go through with them  
18 given the amount of time we have, but what I do want to  
19 focus on, Your Honor, is the provision that Blue Cross  
20 cites on its behalf that shows that the regulatory  
21 scheme that displaces competition and allows  
22 anticompetitive agreements that raise costs.

23 Here is what Blue Cross says. I didn't make  
24 this up, this is them.

25 "Blue Cross contracts with providers must

1                   have reasonable cost controls."

2                   The purpose of the Act, they say, is to  
3 check rising health care costs. The Michigan regulatory  
4 scheme combines both free market and government  
5 regulatory methods of control.

6                   Just that last phrase, which we have  
7 highlighted, is not consistent with their claim that the  
8 whole scheme displaces the free market.

9                   It just doesn't make sense, Your Honor.

10                  Also, there is nothing in the scheme, this  
11 sort of scheme, that suggests that an MFN would  
12 interfere with any of this. Nothing to suggest that the  
13 MFNs at issue here would be the logical result of any of  
14 these provisions.

15                  So I think that is the end of the inquiry,  
16 Your Honor, as to clearly articulated, and I think that  
17 should be the end of your inquiry as to this whole state  
18 action because I don't think they can make a showing or  
19 come close to making a showing of any specific intent.

20                  But if we had to go on, Your Honor, the  
21 first issue is whether Blue Cross gets the benefit of  
22 the Hallie benefit; the Hallie benefit.

23                  Hallie is a Supreme Court case involving  
24 whether a municipality had to satisfy the actively  
25 supervised test, Your Honor, and the only question

1 before the court in that case was whether a municipality  
2 had to satisfy the test.

3 Now, Blue Cross is not a municipality. By  
4 its own admission, it is a private entity. It is a  
5 private corporation by its own admission. And it has  
6 its own officers and board of directors.

7 So the controlling authority, Your Honor,  
8 for determining whether an entity like this, a private  
9 entity, is entitled to the Hallie benefit, is the Sixth  
10 Circuit opinion in Riverview Investments versus Ottawa  
11 Community. Again, it is controlling. It is not cited  
12 by the Defendants in their opening brief. And I think  
13 that is glaring and telling. The claim was similar to  
14 what Blue Cross is making here. There, there was an  
15 entity described by the court that appeared to have a  
16 private structure and an organization combined with  
17 alleged public functions.

18 Just a minute on the facts of that case,  
19 Your Honor. Ottawa Community Improvement Corporation  
20 was not-for-profit organization whose sole purpose was  
21 to review requests for industrial revenue bonds on  
22 behalf of the municipality. That was its job. That was  
23 its only function. The bonds couldn't be issued without  
24 approval from Ottawa CIC.

25 The Court of Appeals noted that Hallie

1 didn't provide a test for determining whether an entity  
2 like that is public or private for the purposes of the  
3 state action exemption.

4           The Court in Riverview made a critical  
5 distinction -- very important here, Your Honor --  
6 between acting pursuant to state policy and performing a  
7 government function. A public act versus acting in  
8 accordance with the state plan.

9           Acting in accordance with the state plan,  
10 which is what Blue Cross says it is doing here, is not  
11 enough.

12           So approving industrial bonds for a  
13 municipality according to a plan approved by the  
14 municipality wasn't sufficient to get the state action  
15 exemption.

16           The Court specifically held that acting  
17 within legislative parameters in a plan approved by a  
18 municipality is not evidence of a public function. And  
19 that is a holding that even though CIC was not selling a  
20 product in the commercial market, as Blue Cross is here,  
21 Blue Cross has not and cannot claim that selling  
22 commercial insurance in competition with other insurers  
23 is a public function. Instead, it simply claims that it  
24 is acting according to a state plan, and as Riverview  
25 makes clear that this simply is not good enough.

1                   Another way to say this, Your Honor, is the  
2 way that you read in Hovencamp, which is a seminal  
3 antitrust view where they say questions of state action  
4 can't be resolved by discovering a state mandate that  
5 the organization serves the public interest. Which is  
6 essentially what Blue Cross is arguing here. Much more  
7 important, though, is the body structure, the  
8 membership, decision-making apparatus, et cetera.

9                   So in addition to setting out this basic  
10 standard, Your Honor, the Riverview Court also noted  
11 several specific structural facts about the bond  
12 approving unity that it considered in deciding that the  
13 entity wasn't -- didn't have the state action defense  
14 available to it: Independent majority board of  
15 directors; Pursuing its own economic interest; Ability  
16 to control training and orientation of its own  
17 personnel; The right to set group rates and charges; Not  
18 a political subdivision; Didn't exercise governmental  
19 authority; The state specifying competition of the board  
20 was insufficient; and, the state power to terminate  
21 existence was insufficient.

22                   So if you apply that test here as well as  
23 the general test, Blue Cross doesn't come close to  
24 getting the cloak of Hallie.

25                   Let me turn finally on this area, Your

1 Honor, to the active supervision issue.

2           The review of standard is whether the  
3 anticompetitive conduct is the state's own. That is the  
4 Supreme Court's test. Is the anticompetitive conduct the  
5 state's own. It is a factual issue. They failed to  
6 raise any issue of fact on any of their arguments, and  
7 they should know since they're the ones that deal with  
8 the State that if they had anything better to say, they  
9 would have come forward with it.

10           Here is their argument. The Michigan law  
11 requires that the Commissioner of the Office of  
12 Financial and Insurance Regulation review Blue Cross's  
13 provider class plan with health care providers. The  
14 MFNs are included in the contracts with the health care  
15 providers issued in accordance with the plan. The  
16 Commissioner reviewed the plan, and therefore, he  
17 reviewed and approved the MFNs. That is their argument.

18           Here is the problem with the argument, among  
19 others. It is apparent on the face of the document and  
20 they handed it up to you, Your Honor. The document is  
21 Appendix 2 to their Memo, but Mr. Hoffman, I think,  
22 handed it up to you. He pointed you to page 5 and page  
23 15. Let's start with what the document says it is.

24           It is a report by the Commissioner limited  
25 to the following: Determining whether the plan meets

1 three legislative goals. Regarding access to health  
2 care. Quality of health care. And cost goals.

3 When you read the report, that is what it  
4 does. It reviews the plan, doesn't analyze the effect  
5 of individual contractual provisions. It doesn't  
6 indicate that the Commissioner otherwise engaged in  
7 review of the contracting provisions. And it certainly  
8 doesn't indicate any approval of the contract clauses.

9 That is in contrast, Your Honor, to cases  
10 like Jackson, which they cite, or the Southern Transport  
11 cases in which the agency reviews the rate and makes a  
12 decision on it.

13 And, in fact, if you read the whole report,  
14 you will see that the Commissioner concludes that Blue  
15 Cross hadn't even met its cost goals.

16 Now, as the Supreme Court made clear in  
17 Ticor, theoretical mechanisms for review for minimal  
18 scrutiny is not enough. You have to show that the  
19 mechanism operates because of an intended and deliberate  
20 state policy, and it is the state's own.

21 Now, the best that they can do is point --  
22 well, they say in their brief that the PCP specifically  
23 cited the MFN. If you look at page 5, there is one  
24 sentence: Hospitals must attest that the rates are at  
25 least favorable to those as other nongovernmental

1 insurers. It is a description of a clause, Your Honor.

2 And by the way, it is only the MFN Equal  
3 Clause, it is not the MFN Plus Clause. It doesn't  
4 approve the clause. It doesn't indicate that it was  
5 considered in anyway or that it is the state's own. At  
6 most, it is minimal scrutiny, and it is not enough.

7 And every assertion that the Commissioner  
8 reviewed the plan and approved the MFN is based on that  
9 one sentence in that report. That is it.

10 Active supervision, they haven't met it.

11 Let's turn quickly to Burford. I'm not  
12 going to say anything about this. As I said, it is  
13 extraordinary circumstances. No court has ever  
14 sustained an antitrust action by the Federal Government.  
15 So I don't think I have to say any more on Burford.

16 Let me turn to Twombly. The Twombly test is  
17 plausibility not indisputability as Blue Cross suggests.

18 Blue Cross has two principal Twombly  
19 arguments as I understood from the presentation today  
20 and from their brief. One is essentially factual and  
21 one is essentially legal as far as I can understand it.

22 The factual arguments focuses on the  
23 allegations regarding product and geographic markets.  
24 Essentially it is a complaint about lack, we haven't  
25 plead enough facts or they disagree with the facts.



1                   With respect to product and geographic  
2 markets, let's start with the then Judge Sotomeyer's  
3 observation that because market definition is deeply  
4 fact intensive, courts rarely grant motions to dismiss  
5 on either product or geographic markets. And I think  
6 recognizing this high hurdle, Blue Cross doesn't seem to  
7 take its attack on these two seriously. There is not  
8 very much in the reply about the product and geographic  
9 markets. And there is not much that can be reasonably  
10 said about foreseeability of the product and geographic  
11 market we have alleged.

12                   As to the product market, we have alleged  
13 group and individual commercial health insurance. We  
14 allege at paragraphs 20 to 24 why those are relevant  
15 markets. Why they're plausible. Blue Cross insurance  
16 provides access to a provider network which insures, and  
17 insures is considered to be very important. There is no  
18 reasonable alternative, and it is much more extensive to  
19 go outside of the network.

20                   With respect to the individual, individual  
21 commercial insurance, same thing. No alternative. If  
22 you go outside the insurers, you have to self-fund. And  
23 that is just too extensive.

24                   That is plausible. That is common sense. I  
25 didn't hear any argument that that wasn't common sense.

1                   If they want to test that with facts and say  
2   that is not how the markets work, they're free to do  
3   that during the proofs, but not on a motion to dismiss.

4                   Geography, it is true, we have a major fact  
5   that underlies the user markets, Your Honor. Consumers  
6   want health insurance that provides access to local  
7   health care providers, doctors and hospitals. Yes, as  
8   the Defendants said, that is what we allege. That is  
9   common sense. They may disagree. They may have some  
10   proof. They may find an expert who says that is not  
11   true, that people like to get in the car to drive 300  
12   miles to find a doctor, they can put that proof on, but  
13   there is really no question, Your Honor, that it is  
14   plausible that people choose their hospitals and their  
15   doctors on proximity to where they live.

16                  And that is what we had to allege.

17                  But we did more than that. We did that at  
18   paragraphs 25 to 32; general terms at paragraphs 49  
19   through 77, we went through individual markets. And we  
20   got much more specific, which we didn't need to do under  
21   Twombly. Icing on the cake, Your Honor.

22                  But just take a look at the maps. We saw  
23   some maps.

24                  THE COURT: Are these maps in yours?

25                  MR. WAYLAND: Yes, they're in the

1 presentation, Your Honor.

2           Let me say a word about what the Defendants  
3 would have us do. As I understood it, they're angry at  
4 us because some of our markets are geographically small  
5 and some of our markets are geographically big. Can you  
6 imagine if we came in with a 20 by 25 mile block and  
7 carved up the State of Michigan and said, well, those  
8 are all the same size and they're the markets. They  
9 would be in here saying that is crazy. But now they're  
10 saying small geographic market size is wrong. Well,  
11 there is a reason that small geographic markets are  
12 there. Because we looked at individual markets, and we  
13 have alleged that there are differences. So in Lansing,  
14 part of the issue is, how far will somebody drive to go  
15 to a doctor? Will they drive to Flint? Will they drive  
16 to Jackson? Will they drive to Kalamazoo? And I think  
17 our quote plausible market that 80 miles to get to the  
18 doctor or 59 minutes is too long if you can go to the  
19 hospital in Lansing in 15 minutes. And there is plenty  
20 of court authority that says you can allege a single  
21 city, a multi-city, counties or states, whatever. It is  
22 fact specific.

23           We've got a proposition that people would  
24 rather drive to the neighborhood hospital than to get in  
25 a car and drive to Flint.

1                   They can come in and disprove it, but they  
2                   can't challenge it on a motion to dismiss.

3                   Let me draw the Court's attention to a  
4                   March, 2011 decision by the Fourth Circuit, Dupont v  
5                   Kolon, 2011 West Law 834658. We're going to hand it up  
6                   at the end. It overturned the district court's decision  
7                   for failure to state a geographic market. It is a very  
8                   thorough and appropriate analysis noting that markets  
9                   may be as large as the U.S. or as small as a single  
10                  city.

11                  I'm not going to go through it given the  
12                  time, Your Honor, but --

13                  THE COURT: Wait a minute, tell me what this  
14                  citation is. Do you have --

15                  MR. WAYLAND: We handed it up, Your Honor.

16                  THE COURT: Well, hand it to the people who  
17                  are going to reply so they can look at it while you're  
18                  arguing, and then if they want to say something about  
19                  it, they can say something about it, if they don't  
20                  already know it. They may already know it.

21                  Do you already have that?

22                  MR. STENERSON: No, Your Honor.

23                  THE COURT: So take a look it is. And it's  
24                  2011 West Law 834658; is that right?

25                  MR. WAYLAND: Yes, Your Honor.

1           The court deals with similar arguments as to  
2   what Blue Cross has made here, and it says really there  
3   are two bases you can dismiss on a failure to plead a  
4   market, and that is plead no market at all. And by the  
5   way, that is what Total Benefits is, Your Honor, the  
6   case they rely on. That was a case where there was no  
7   geographic market alleged at all. We have the Complaint  
8   that we're going to hand up at the end, Your Honor, and  
9   what the court said is if you're not going to allege a  
10   market, you've got to give us some facts so we can  
11   figure it out ourselves. So that is a case where there  
12   is no market alleged at all.

13           Anyway, Twombly says, look --

14           THE COURT: And it's spelled C O L O N?

15           MR. WAYLAND: It's K O L O N.

16           If you don't allege a market, you're out.  
17   If your market is unreasonably or implausibly narrow,  
18   you're out. And if your market is self-contradictory,  
19   you're out.

20           I don't think that test damages us at all,  
21   Your Honor.

22           So that is market and product definition.  
23   Let me turn to what I sort of understand to be a legal  
24   argument, which is that we haven't shown recoupment, we  
25   haven't pled recoupment, and we haven't pled foreclosure

1 sufficiently.

2                   So Blue Cross claims that the Complaint  
3 fails to allege recoupment. There is a fundamental  
4 problem with this, Your Honor. They have the wrong  
5 section of the Sherman Act.

6                   This is a Section 1 case, which has to do  
7 with agreements that unreasonably restrain trade.

8                   Recoupment, Your Honor, is a concept  
9 associated with unilateral behavior by a monopolist or a  
10 would-be monopolist engaged in predatory pricing or  
11 predatory bidding. These are acts subject to challenge  
12 under Section 2 of the Sherman Act, as the cases cited  
13 by Blue Cross make clear. They're Section 2 cases, Your  
14 Honor.

15                   Specifically, Blue Cross likens this case to  
16 a predatory bidding case. And as the Supreme Court said  
17 in Weyerhaeuser, you have to prove two things in a  
18 Section 2 predatory bidding case. That the monopolist  
19 or would-be monopolist drives up the price of input  
20 above the revenues generated by the sale, and that the  
21 monopolist will have the capacity to get that money back  
22 at the end. Takes a loss, gets it back. That is what  
23 recoupment is about. It is a Section 2 claim.

24                   This is a Section 1 case challenging the MFN  
25 agreement and its effect on competition.

1                   It is not a case about the specific price  
2     that Blue Cross is charging. It is not a case about the  
3     specific price that Blue Cross is charging.

4                   We are not saying that the anticompetitive  
5     act is a unilateral act of paying too much, as Plaintiff  
6     alleges in Weyerhaeuser, we're saying that the MFN  
7     agreement, not the specific price paid by Blue Cross,  
8     have the effect of raising the costs that would prevail  
9     in a truly competitive market. That is an unreasonable  
10    restraint of trade under Section 1.

11                  It doesn't matter for Section 1 purposes  
12    whether Blue Cross is buying above or below the price at  
13    which it can make a profit, what matters is the price is  
14    higher than it would be in a competitive market because  
15    of the agreement. Not because of the price.

16                  That is the fundamental problem, they have  
17    confused Sections of the Antitrust Act.

18                  And Blue Cross pays for the MFNs and passes  
19    through those rate increases to its customers. It is  
20    not ensuring short-term losses, so it is paying more.  
21    It is not predatory in the Burford or Weyerhaeuser  
22    sense, and it results in direct harm to consumers, which  
23    wasn't present in Weyerhaeuser.

24                  So that is recoupment, Your Honor. Wrong  
25    Section of the antitrust laws.

1                   Foreclosure. This I had a little more  
2   trouble understanding exactly what the complaint seemed  
3   to be. But as far as I can understand it, Your Honor, I  
4   think what they're saying is that the Complaint failed  
5   to adequately plead foreclosure, and then we had to use  
6   those magic words somehow. But of course, the law  
7   doesn't require that. There are no magic words in the  
8   antitrust world.

9                   I think essentially what the argument is, it  
10   is a claim that the Complaint fails to properly plead  
11   anticompetitive effect. That is what I think they're  
12   trying to say. But in fact, the Complaint pleads much  
13   more about the anticompetitive effect than is required  
14   under the law.

15                  If you look at paragraphs 41 to 49, the  
16   anticompetitive effects are alleged in substantial  
17   detail. Effect on prices, restrictions on competition,  
18   gives a bunch of markets. That would be enough under  
19   Twombly. But the Complaint does much more. Paragraphs  
20   49 to 79, Your Honor, those paragraphs are specific  
21   illustrative examples of harm. Thus, the facts alleged  
22   in the Complaint show exactly what Blue Cross says the  
23   law requires.

24                  A competitor is foreclosed in the antitrust  
25   sense whenever it is substantially disadvantaged and its



1 access with significant input.

2           The Complaint identifies access to hospital  
3 services at discounted rates as a critical input to  
4 competition in the health insurance markets. And that  
5 is important because employers and individuals demand  
6 that health insurance plans provide access to networks  
7 of doctors and hospitals that are close to their homes  
8 and work places.

9           The fact that the insurers either accept  
10 price increases with hospitals with MFNs rather than  
11 drop the hospital from the network or declines to enter  
12 markets where important hospitals have MFNs shows the  
13 factual linkage between the MFN clauses and the harm to  
14 competition and the health insurance market.

15           And we give a particular example, Your  
16 Honor, in the Thumb area, there are eight hospitals, all  
17 with MFN clauses. We allege very specifically that the  
18 effect of the MFN Clauses drives up the cost of hospital  
19 services. It didn't use the MFN to get a lower price,  
20 Your Honor, as we allege, but to insure that prices were  
21 raised. That's all we have to allege.

22           Well, they say maybe we should have done it  
23 for all 17 markets, every hospital. We don't have to do  
24 that. Twombly doesn't require it. We have stated  
25 enough to satisfy our Section 1 pleading requirements.

1                   Now, the same issue was before the Court in  
2 Delta Dental. The Defendants don't like it because it  
3 is right on point. The Court sustained a complaint in  
4 which the Government alleged that the not-for-profit  
5 insurers use of MFN clauses caused higher consumer  
6 prices.

7                   The anticompetitive analysis there focused  
8 on the effects of the clause which were alleged to be  
9 excluding rivals, retarding expansion and increasing  
10 health care costs. The Court didn't require the  
11 pleading some percentage of proposes. That is not at  
12 stake here, we pled increased costs.

13                  So Your Honor, just to sum up, let's go back  
14 to the second slide.

15                  THE COURT: I can go back to the second one,  
16 what page are you on? The summary page?

17                  MR. WAYLAND: Yes, the summary page.

18                  It doesn't matter, I can just talk through  
19 it, Your Honor.

20                  THE COURT: Okay.

21                  MR. WAYLAND: The claim here is that we  
22 somehow interfered with the health care system in  
23 Michigan. We haven't done that. But interferes with  
24 the health care system in Michigan is contracts that  
25 raise prices above competitive levels.

1                   Blue Cross is not entitled to the state  
2   action exemption. It is a self-administered private  
3   entity. And we have satisfied the Twombly requirements  
4   which simply require plausible market. And plausible  
5   harm. Thank you, Your Honor.

6                   THE COURT: Alright, thank you.

7                   MR. PASCOE: The Motion to Dismiss addresses  
8   both the federal claims and the Michigan specific claims  
9   under Michigan Anti-Reform Act. I thought this was  
10   their Motion to Dismiss argument, but they didn't  
11   address that. So I don't know when --

12                  THE COURT: You want to argue? That's fine,  
13   you can argue.

14                  MR PASCOE: As it relates to Michigan  
15   specifically.

16                  THE COURT: You can. Go right ahead.

17                  MR. PASCOE: Thank you, Your Honor.

18                  THE COURT: I assume they were relying on  
19   their pleadings for that.

20                  MR. HOFFMAN: Your Honor, if I may, what we  
21   actually had suggested was that we address the State  
22   issues after all the Federal issues, but we're happy to  
23   rely on our pleadings for this, and if I might say a  
24   word in response to Counsel?

25                  THE COURT: But your timeframe is like over

1 an hour, almost an hour, so I assumed you were focusing  
2 on what you wanted to focus on in oral argument. I  
3 didn't expect that you were going to take another how  
4 long?

5 MR. HOFFMAN: I think for this --

6 THE COURT: Well, I think I will let him  
7 argue and you can reply.

8 MR. PASCOE: My comments are brief.

9 THE COURT: You don't have to make your  
10 comments brief. I wasn't intending for the Government  
11 or Michigan to make their comments brief.

12 MR. PASCOE: Thank you, Your Honor.

13 My name is Dee Pascoe with the Michigan  
14 Department of Attorney General for the State of  
15 Michigan. And the State of Michigan concurs in the  
16 Department of Justice's arguments and briefs opposing  
17 their Motion so far, and I'm not going to repeat any of  
18 that, I'm just going to address the Michigan specific  
19 claim.

20 THE COURT: Okay.

21 MR. PASCOE: Because that is what we wrote  
22 separately about.

23 THE COURT: Okay.

24 MR. PASCOE: Blue Cross Blue Shield of  
25 Michigan argued that as it relates to the Michigan

1 Antitrust Reform Act that there were three exceptions  
2 that would apply and result in their conduct not being  
3 reviewable under that Act. And that comes up under  
4 Michigan Compiled Laws 445.774.

5           The first subsection is Subsection 6 which  
6 says that the Act shall not apply to a transaction or a  
7 conduct of an unauthorized health maintenance  
8 corporation when the transaction or conduct is to reduce  
9 cost of health care and is permitted by the  
10 commissioner. The list is health maintenance  
11 corporations, health insurers, medical care corporations  
12 or health service corporations or health care  
13 corporation. When the transaction or conduct is to  
14 reduce the cost of health care and is permitted by the  
15 Commissioner.

16           So this particular Subsection in the  
17 Michigan Antitrust Reform Act clearly refers to Blue  
18 Cross by its reference to the health care corporations  
19 as we discuss in the brief.

20           And as alleged in the Complaint, the  
21 Complaint alleges that these MFNs are used not to reduce  
22 the cost of health care but to, in fact, increase them.  
23 So this Subsection does not apply.

24           The second issue with that is whether it is  
25 permitted by the Commissioner. And as the Department of

1 Justice has already addressed, it is our position that  
2 this particular conduct was not permitted by the  
3 Commissioner.

4 And we argued in the brief that this is the  
5 Subsection that is most applicable because it refers to  
6 the health care corporations specifically.

7 The other two Subsections are Subsection 4  
8 of 445.734, and that talks about the Act does not apply  
9 to a transaction or conduct that is specifically  
10 authorized. And our position, as you have already been  
11 explained, is that this particular conduct has not been  
12 specifically authorized.

13 Moreover, Subsection 6 is the specific  
14 applicable part.

15 And then, the last Subsection is Subsection  
16 5 that we referred to which talks about when a  
17 transaction or conduct made unlawful by this Act shall  
18 not be construed to violate this Act where it is the  
19 subject of a legislatively mandated pervasive regulatory  
20 scheme which confers exclusive jurisdiction on a  
21 regulatory board or officer to authorize, prohibit or  
22 regulate the transaction or conduct.

23 And in this regard, again, the first point  
24 is that Subsection 6, which refers specifically to  
25 health care corporations, is the specific exclusion that

1 would apply because those requirements are not met.

2 And secondly, this Subsection, Subsection 5,  
3 refers to exclusive jurisdiction, and it is our position  
4 that there is not exclusive jurisdiction in this case  
5 because of the other avenues of redress that are  
6 available.

7 So just to wrap it up, the Michigan  
8 Antitrust Reform Act applies to the review of these  
9 MFNs. Subsection 6 is the one that could possibly  
10 exempt them under MAR, but the allegation in the  
11 Complaint is that these MFNs are used in a way that does  
12 not reduce costs, and therefore, that Subsection does  
13 not apply.

14 And moreover, just generally, the Michigan  
15 policy in regard to this issue which is covered and  
16 stated in P.A. 350, which is 550.1102, are those three  
17 basic things of access for people to quality care and  
18 cost containment. And that dovetails perfectly with the  
19 reference in Subsection 6 where the conduct will be okay  
20 if it is to reduce cost.

21 But in this particular case, the allegations  
22 are that these contractual provisions are being used in  
23 a way that does not reduce costs; and therefore, these  
24 exceptions don't apply. Thank you, Your Honor.

25 THE COURT: Alright, thank you.

1 MR. HOFFMAN: Thank you, Your Honor. Bruce  
2 Hoffman again for Blue Cross Blue Shield of Michigan.

3 THE COURT: And I'm sorry that I  
4 misunderstood you, but I didn't anticipate that you  
5 would want another whole argument.

6 MR. HOFFMAN: Your Honor, we're going to  
7 stand on our briefs after listening to the State.

8 THE COURT: Okay.

9 MR. HOFFMAN: Let me turn to responding to  
10 the DOJ's argument on state action, and I'm going to  
11 simply go, Your Honor, in exactly the order that Mr.  
12 Wayland went.

13 THE COURT: But it is not necessary for you  
14 to repeat your beginning argument.

15 MR. HOFFMAN: I have no intention of doing  
16 that, Your Honor.

17 Let me start very quickly by saying that  
18 re-pleading does not solve the state action or  
19 abstention problems here.

20 After two years of investigation and half a  
21 million documents, we would submit that dismissal with  
22 prejudice on the regulatory offense is extremely  
23 appropriate.

24 Now, let me turn to the arguments Mr.  
25 Wayland made.



1                   First he said that it is inconceivable that  
2     attacking provisions in defense that has the effect of  
3     increasing prices could possibly interfere with  
4     Michigan's regulatory scheme for health care, how could  
5     that be?

6                   The answer, and the reason why this case is  
7     a flat-out attack on Michigan's health care system is  
8     quite obvious and explained in detail in our briefs. It  
9     is because it precludes us to hollow Blue Cross and the  
10    Commissioner by depriving Blue Cross of the advantages  
11    the State expressly gave it, the ability to use its size  
12    to achieve competitive advantages in its hospital  
13    contracts over its competitors while leaving Blue Cross,  
14    which is the instrument of state policy, the insurer of  
15    last resort, the entity that has to, and the only entity  
16    that has to provide health care coverage everywhere,  
17    this case would leave all of those burdens on Blue  
18    Cross's shoulders while taking from it the benefits the  
19    State gave it.

20                  And Your Honor, in doing that, by virtue of  
21    a permanent injunction and an order, which the  
22    Department seeks, the Department would turn this Court,  
23    an antitrust court, into a super regulator of Blue  
24    Cross's contracting policies. And if you have any doubt  
25    about that, Your Honor, read their request for relief.

1 They don't just ask, although this would be far more  
2 than enough to overturn Michigan's health care system,  
3 but they don't just ask for an injunction against MFNs,  
4 they ask for an injunction against any form of contract  
5 or arrangement that has the same purpose or effect as an  
6 MFN.

7                   How is that to be assessed without this  
8 Court sitting once a month, once a week, whatever it  
9 might take to figure out if every provider contract Blue  
10 Cross signs has the same purpose or effect as an MFN?

11                   This would Michigan health insurance scheme,  
12 health care system upside down.

13                   Now, the Department of Justice mentioned  
14 that the State has joined the Attorney General in these  
15 arguments. Obviously, we have a response to that in  
16 Ocean State, but I would also just note that if you look  
17 at the Sixth Circuit decision in Jackson Tennessee  
18 Health Care at page 613, the Sixth Circuit was easily  
19 dismissive of the fact that State Attorney Generals  
20 arguing against state action immunity doesn't deserve  
21 any particular weight.

22                   The next argument that Mr. Wayland made and  
23 a point that was sort of a point he made several times  
24 is that the test for a clearly articulated state policy  
25 is, as he put it, the state must have a policy to allow

1 the anticompetitive act. They must be specifically  
2 authorized. They must be specifically and explicitly  
3 identified.

4 Your Honor, let me point you back to slide 7  
5 in our presentation where we repeatedly quote from the  
6 Supreme Court and the Sixth Circuit rejecting over and  
7 over and over again the test that the Department of  
8 Justice proposes in exactly the words the Department  
9 uses. This is just not the law.

10 The test, Your Honor, is foreseeability.  
11 The issue is could the legislature have foreseen that  
12 Blue Cross would use its size to obtain advantages. The  
13 answer is not only could it have foreseen it, it did  
14 foresee it. That it perhaps didn't foresee the exact  
15 outcome is irrelevant, although it did.

16 As the Second Circuit said in the Omega  
17 Owens versus city of Buffalo case, 171 F.3d 755, quote,  
18 where the state contemplates a certain type of  
19 anticompetitive activity, partner immunity, state action  
20 immunity, applies even if that activity is conducted  
21 under circumstances that magnify the anticompetitive  
22 effects thereof.

23 Once again, the Department cites to Devaugh,  
24 and I don't think I need to say any more about that  
25 other than if you read that case, Your Honor, you will

1 see it is grossly off point here. It dealt with an  
2 unbelievably narrow state statutory scheme that was  
3 nothing like the scheme at issue here.

4 The next point made by the Department of  
5 Justice is that Michigan doesn't displace competition  
6 because it allows some competition.

7 I think we have dealt with that. It is  
8 absolutely crystal clear that a legislative scheme need  
9 not eliminate competition, and in fact, even encourages  
10 it so long as the statutory scheme contemplates the kind  
11 of conduct at issue, and this one clearly does.

12 They then argue relying entirely on  
13 Riverview that Blue Cross is a private entity, and in  
14 doing so, Your Honor, they simply get all the facts of  
15 Riverview wrong. All Your Honor needs to do to decide  
16 this issue is you can look at our two slides, slides 8  
17 and 9, that talk about what the test actually is and  
18 what the Riverview court said. But you can also simply  
19 read the Riverview decision, lay it next to the Sixth  
20 Circuit's decision in Consolidated Television, and look  
21 at the facts of this case. There is no question that  
22 Blue Cross is a Prong One entity.

23 And as the Eleventh Circuit said in the  
24 Crosby case, quote, the mere grant of powers which  
25 resemble those of a private corporation does not

1 transform an otherwise governmental entity into a  
2 private actor of the type you would expect to engage in  
3 a private price fixing agreement. It is quite clear  
4 that quality public entities effectuating state policy  
5 need only show clear articulation.

6           The next argument the Department made is  
7 that there is no active supervision, because, again, it  
8 is just rehashing the brief. And as it said, the  
9 Insurance Commissioner simply rubber stamped in their  
10 brief and parenthetically mentioned there that MFN  
11 provision at issue here. That is simply not true. If  
12 you read, Your Honor, our Appendix 2 and the rest of the  
13 Appendices that we submitted, and if you look at P.A.  
14 350, it is absolutely clear that there is intensive  
15 supervision. The fact that the Commissioner's  
16 supervision takes place against the backdrop of  
17 determining whether Blue Cross's hospital contracts help  
18 Blue Cross achieve the three goals of comprehensive  
19 universal health care access, of good quality health  
20 care for all citizens in Michigan, and of costs control  
21 doesn't in any way devalue or demean the Commissioner's  
22 review as the Department of Justice suggests.

23           And let me say further, Your Honor, that  
24 when Mr. Wayland pointed out that Blue Cross didn't meet  
25 its cost goal as the Commissioner found, I don't think

1 you could ask for clearer evidence of active  
2 supervision. Because in that case, the insurance  
3 commissioner looking at Blue Cross's provider contracts,  
4 looking at the MFN clauses said notwithstanding the fact  
5 that Blue Cross's costs increase higher than the  
6 statutory formula, Blue Cross's practices met the  
7 standard because overall they enable Blue Cross to  
8 achieve access and quality.

9 That is far more than necessary for active  
10 supervision.

11 On Burford, Your Honor, there is no attempt  
12 to refute any of our arguments. The Sixth Circuit, as I  
13 read to Your Honor, has expressly rejected the notion  
14 that the presence of the United States in a case  
15 prevents abstention. I think that issue is effectively  
16 over. Thank you, Your Honor.

17 THE COURT: Okay, thank you.

18 MR. STENERSON: Briefly, Your Honor.

19 First, on product market, two points. The  
20 DOJ alleges group health insurance and individual  
21 insurance. That is a red herring. It is a misdirection  
22 play. All of the conduct here that is being challenged  
23 occurred in a completely different market, the market  
24 for purchasing hospital services. There is nothing pled  
25 about the markets in the Complaint.

1                   Without that, you cannot even begin -- the  
2   DOJ would have to establish that harm occurred in the  
3   hospital services market before it could even begin to  
4   suggest that harm then occurred in an adjacent market  
5   for the sale of health insurance in the group and  
6   individual situations.

7                   So they're skipping the entire step.  
8   They're complaining about conduct here in hospital  
9   services and pleading product markets adjacently over  
10   here. It is insufficient.

11                  Geographic markets. I heard the DOJ concede  
12   that, yes, in fact, they are resting on their sole and  
13   single allegation to support 17 different markets that  
14   people want health care near their home and work.

15                  You know, Your Honor, Blue Cross is not  
16   angry about the allegations, which is what I heard DOJ  
17   say. What the DOJ wants Blue Cross to do is to litigate  
18   against a ghost. We don't know where the boundaries  
19   are.

20                  The fact, the single fact pled that people  
21   want health care close to their home or work does not  
22   even begin to inform where DOJ wants to draw these  
23   arbitrary boundaries. All we want to know is what the  
24   markets are and what facts pled, if proven to be true,  
25   would, in fact, establish those boundaries.

1                   They don't do it. They can't do it.

2                   The Fourth Circuit case that they cite  
3 relies upon Todd v Exxon and in fact quotes the citation  
4 that I told Your Honor when I first spoke, and that is  
5 on a motion to dismiss, cases in which involve dismissal  
6 on the pleadings is appropriate frequently when they  
7 involve the, quote, failure even to attempt a plausible  
8 explanation as to why a market should be limited in a  
9 particular way.

10                  This Complaint is completely devoid of any  
11 explanation of why the market should be delineated in  
12 the 17 drastically different ways they attempt to plead  
13 them.

14                  As to the MFNs themselves, Your Honor, I  
15 would like to direct your attention to page 5 of the  
16 Government's presentation. It is the bar chart where  
17 they show the purported effect on prices to Blue Cross  
18 and rivals. They get the MFN Option 1, Option two.

19                  What does this show? Well, first off, I  
20 don't know what hospital this is. I don't know what  
21 geographic market it is in. I don't know what product  
22 market it is in. It doesn't even begin to be  
23 sufficient. But just looking at this on its face, if  
24 Blue Cross were paying a price that shows that it  
25 changes the competitive prices of Blue Cross and the



1 insurers that a hospital gets. A hospital needs money.  
2 There is a whole host of reasons why they might seek  
3 additional funds. Blue Cross is negotiating at  
4 arms-length with the hospital.

5           There is no suggestion in this Complaint  
6 that Blue Cross knows what the competitors are paying.  
7 It doesn't know if it is paying too much or not enough.  
8 It is out there everyday bargaining hard to get the  
9 lowest price.

10           If it uses the MFN to cause its price to go  
11 up lower than it otherwise would to cover the more money  
12 that the hospitals need, that means that other  
13 competitors may pay more. It falls under the category  
14 that there is no such thing as the free lunch. But the  
15 fact that Blue Cross is trying to keep its costs down  
16 does not make its conduct anticompetitive.

17           And to the extent that Blue Cross is seeking  
18 low costs and it seeks an MFN to make sure that it  
19 doesn't pay for more than its fair share of any  
20 increasing costs, that goes directly to the statutory  
21 obligations of P.A. 350 that Blue Cross not pay more  
22 than its own fair share.

23           And that is all these charts show. It shows  
24 the competitive process at work. And the Insurance  
25 Commissioner, Your Honor, is the appropriate office to

1 determine whether or not Blue Cross is paying its fair  
2 share. And we submit it is.

3 On the Section 1 and Section 2 point, a few  
4 observations.

5 First, Dentsply, the case that the  
6 Government primarily relies upon to show that it can  
7 establish foreclosure, was a Section 2 case. But the  
8 more important point is the Third Circuit in Dentsply on  
9 page 197 found that the Government lost the Section 1  
10 count in the district court. The Third Circuit  
11 recognized that it was harder for the Government to  
12 establish a Section 1 violation rather than a Section 2  
13 violation, not easier. So in other words, in Dentsply,  
14 the exact conduct was found not to violate Section 1,  
15 the Government did not appeal that to the Third Circuit,  
16 and the Third Circuit ruled on Section 2 grounds.

17 So I would submit to you that the test is  
18 harder under Section 1 not easier as the Government  
19 suggests.

20 In addition to that, the Supreme Court in  
21 Matsushita Electric versus Zenith Radio case, 475 US  
22 574, and this is at Footnote 8, the court in Footnote 8,  
23 the Supreme Court explains that when you're challenging  
24 pricing conduct under Section 1, that is at arms-length  
25 negotiation, it does not violate Section 1 unless it is

1 alleged that the conduct, the pricing conduct of the  
2 defendant is predatory. In other words, the Supreme  
3 Court establishes the same test under Section 1 and  
4 Section 2 for the type of conduct that is being alleged  
5 here. And more specifically, the Weyerhaeuser case and  
6 the Supreme Court when the sole complaint here is that  
7 cost of the competitors are going up establish the  
8 elements that must be pled and proven by Plaintiff, and  
9 the Government concedes they cannot meet that test here,  
10 so therefore, the case should be dismissed.

11 THE COURT: Thank you for your arguments.

12 We're going to take a five-minute break, but  
13 I want to hear the class action Plaintiffs reasons  
14 relative to the appointment of different counsel and the  
15 Motion to Consolidate next.

16 (Recess taken at 4:45 p.m.)

17 \* \* \* \* \*

18 (Back in session at 4:55 p.m.)

19 THE COURT: I don't think I need to hear oral  
20 argument on the motion to strike or the motion to, what  
21 is it, delay discovery?

22 MR. McNEILL: Your Honor, if I could just --

23 THE COURT: No, you're going to tell me the  
24 reason and that is going to be argument, so I don't  
25 think I need to do that. I really don't.

1                   MR. McNEILL: I am a lawyer, I can't help it  
2 if I don't give it a shot.

3                   THE COURT: But now the reason you're going  
4 to give me, that will be arguments. So I will tell you  
5 that I pay attention to the submission of Counsel in  
6 detail and I will pay attention to that one in detail.

7                   Someone else wanted to argue it, too?

8                   MR. ETTINGER: Your Honor, The Hospital  
9 Defendants would like to be heard on that issue because  
10 --

11                  THE COURT: No, don't because, that is  
12 argument, and so the answer is the same answer to Mr.  
13 McNeill.

14                  MR. McNEILL: Your Honor, without arguing,  
15 honest, would you defer consideration of that issue  
16 until you hold the scheduling conference or the Rule 26  
17 conference?

18                  THE COURT: That is argument.

19                  MR. McNEILL: Just asking for a deferral.

20                  THE COURT: That is argument.

21                  MR. McNEILL: I understand that, and I will  
22 now sit down. I am going to sit down now.

23                  MR. ETTINGER; Well, I will risk your ire  
24 and I will say one sentence.

25                  THE COURT: No, I get to exercise my

1 discretion not to hear oral argument at all. Are you  
2 going to argue?

3 MR. ETTINGER: Well, I don't think it is  
4 arguing. If you will indulge me with one sentence, I  
5 will sit down.

6 The Hospital Defendants' interests are  
7 involved with any stay of discovery, and thus it needs  
8 to be considered with the various motions in the  
9 Hospital Defendants' case. It can't be looked at  
10 alone.

11 I have no desire to argue the merits, I just  
12 wanted to make you aware of that concern.

13 THE COURT: Alright, thank you.

14 I think I should spend my time hearing, and  
15 I respect all of your requests, but I really don't think  
16 on a motion to stay I need anything further than the  
17 pleadings. If you think there is something not in your  
18 pleading, you can ask to supplement and I will allow  
19 that as long as you don't say any of the same things  
20 over. But I think it is clear.

21 I would rather, as I indicated, spend my  
22 time on hearing the class action Plaintiffs' reasons why  
23 they want different counsel and the Motion to  
24 Consolidate.

25 Mr. Miller, you're going to argue that?

1 MR. MILLER: Yes, Your Honor, if I may.

2 THE COURT: Are you the only one that is  
3 going to present argument? Ms. Oliver? And who else?

4 Mr. Thompson.

5 MS. OLIVER: I think once you hear what he  
6 has to say, we might be done for today. I'm not sure.

7 THE COURT: And does anybody else want to be  
8 heard on that?

9 MR. THOMPSON: Jason Thompson on behalf of  
10 the City of Pontiac, Your Honor.

11 MR. HOFFMAN: Your Honor, do you want to be  
12 heard from the Defendants?

13 THE COURT: If you would like to be heard.

14 MR. HOFFMAN: I would like to.

15 THE COURT: You all are limited much, much  
16 more than the prior arguments, so I'm sure you all can  
17 do this in 10 minutes or less each. Someone was waiving  
18 their fingers saying five minutes.

19 MR. MILLER: May it please the Court, I'm  
20 speaking on behalf of the Shane Group and authorized by  
21 Mr. Fred Isquith and Mary Jane Fait from the Wolf  
22 Haldenstein firm.

23 THE COURT: And you're new to the box, I'm  
24 sure.

25 MS. FAIT: I am, Your Honor. My flight was

1 cancelled from Chicago, and I do apologize for my  
2 lateness.

3 THE COURT: And what is your last name?

4 MS. FAIT: Fait; F A I T: Mary Jane.

5 THE COURT: Anybody else new in the box?

6 MR. MILLER: I'm also speaking on behalf of  
7 my former partner, David Fink, who just started his own  
8 law firm. We're very good friends, and we're working  
9 together on many cases together.

10 I'm speaking on behalf of the Michigan  
11 Regional Carpenters Group as well.

12 THE COURT: I don't think you need to go  
13 through that unless there is somebody new from your  
14 Group.

15 MR. MILLER: I just want to make it clear  
16 because the original pleadings that we filed were on  
17 behalf of the Shane Group and my argument is being  
18 supported by the Michigan Regional Carpenters Group as  
19 well as the Steele Plaintiffs Group, which is Mr. Dan  
20 Gustafson from the Gustafson Gluek firm, and Alyson  
21 Oliver from the Kresch Oliver firm.

22 And what I'm getting to, Your Honor, is one  
23 of the things I'm currently doing is serving as a  
24 co-chair on the American Bar Associations's subcommittee  
25 on MDL and class action procedure, and one problem we're

1     trying to address is disputes between Plaintiffs Counsel  
2     over cases.

3                     We think that is a bad thing for the  
4     profession. I think it is fortunate that we have had  
5     very little of that in the Eastern District of Michigan,  
6     and I hope that we don't have that problem in the  
7     Eastern District of Michigan.

8                     So my point is we have been working very  
9     hard over the last couple of weeks and today to try to  
10    come up with a private ordering for lead counsel that we  
11    would submit to Your Honor, which is encouraged by the  
12    Manual on Complex Litigation, and of course, subject to  
13    Your Honor's good judgment and discretion.

14                    And in that regard, we have had negotiations  
15    with Mr. Thompson, who represents the city of Pontiac,  
16    an attorney who I like and respect, and I'm pleased to  
17    report that we have made progress in that regard,  
18    including today, but we're not there yet. And I'm  
19    hopeful that within a few days, we would have a yea or  
20    nay on a private ordering. And that we would be -- and  
21    I hope we have the yea -- and that we would be able to  
22    present Your Honor with the proposed ordering for the  
23    organization of the Plaintiffs attorneys to avoid  
24    disputes between attorneys, and most importantly, to  
25    assure the effective and efficient prosecution of this



1 case.

2 So my suggestion to Your Honor is to perhaps  
3 put this over for a short time and allow us to complete  
4 this process. That's my suggestion to the Court.

5 THE COURT: And what do you think is a short  
6 period of time?

7 MR. MILLER: I would say a week. Hopefully  
8 less.

9 THE COURT: Alright.

10 Mr. Thompson, do you want to be heard on  
11 this?

12 MR. THOMPSON: Certainly, Your Honor.

13 Good afternoon, Your Honor, Jason Thompson  
14 from Sommer Schwartz on behalf of the city of Pontiac,  
15 and I will be even shorter than Mr. Miller.

16 I concur with everything he said. We are  
17 working very hard with this, and I think within one week  
18 we will be able to respond to Your Honor with a,  
19 hopefully, as he said, a yea in terms of private  
20 ordering. If not, we would be happy to stand on our  
21 briefs. I don't think we need to come back and have  
22 additional argument, unless Your Honor has a request for  
23 that.

24 THE COURT: Thank you, Mr. Thompson.

25 MR. ETTINGER: Your Honor, David Ettinger,

1 and I think I can speak for the Hospital Defendants on  
2 this.

3 I'm a little unclear on what Mr. Miller and  
4 Mr. Thompson were speaking about. It is the first we  
5 have heard it.

6 If it is about simply choice of counsel, we  
7 have no dog in that hunt and we have no position. If it  
8 is also about consolidation, we certainly do, but we  
9 don't know what we would be reacting to, so we would  
10 have to wait to see what they propose.

11 THE COURT: I think they were talking about  
12 just choice of Counsel. Were you also talking about  
13 consolidation?

14 MR. MILLER: Choice of Counsel, but they are  
15 related, Your Honor, because once we have private  
16 ordering, and I hope we do, the logical next step would  
17 be for Plaintiffs Counsel to get together and make  
18 judgments about what should be in a consolidated amended  
19 complaint. So that we would avoid piecemeal litigation  
20 ideally.

21 THE COURT: Alright.

22 MR. ETTINGER: I guess the point I don't  
23 know what it is we would be responding so. I don't  
24 think we have an objection to waiting and seeing and  
25 then we may need to be heard and may not need to be

1 heard. It is hard to anticipate that.

2 THE COURT: I agree with you on that.

3 Who wanted to be heard over here further on  
4 this issue?

5 Okay, so they think they're ready in a week,  
6 and so do you want to give them something to respond to  
7 relative to that? So then in a week they don't say we  
8 haven't had a chance to digest this and we would like to  
9 have a chance to do that.

10 MR. MILLER: Your Honor, as soon as we come  
11 to an agreement, of course we will disclose that to the  
12 Defense and to Your Honor.

13 THE COURT: So we need a timeframe for doing  
14 that.

15 MR. MILLER: One week, Your Honor.

16 THE COURT: One week you're going to give us  
17 something?

18 MR. MILLER: Yes.

19 THE COURT: And then you want us to come  
20 back and let them say why they don't like it or they do?

21 MR. MILLER: Yeah. Well, what will likely  
22 happen is in a week we hope to have a proposal to Your  
23 Honor as to organization for the Plaintiffs Attorneys.  
24 Once Your Honor accepts that or modifies it, we hope  
25 accepts, we would then be in a position to make a

1 judgment about the next step from the Plaintiff's  
2 perspective, which is typically to file a consolidated  
3 amended complaint.

4 We will promptly communicate with the  
5 Defense as we are eager to move our case forward in an  
6 efficient manner. So we're incented to move as quickly  
7 as we can.

8 THE COURT: So you're going to provide a  
9 proposed organization to us a week from tomorrow, which  
10 would be like the 26th of April. And you're going to  
11 provide that to all the Defendants because some of the  
12 Defendants haven't objected, but they might once they  
13 see it. And so then do you want another week for them  
14 to say we agree or we don't agree?

15 MR. MILLER: Sure, that is fair.

16 THE COURT: Well, I was kind of looking at  
17 them.

18 MR. ETTINGER: Your Honor, I think that is  
19 fine. Obviously, the thing that counts for us is the  
20 next stage when the Plaintiffs then go off and come back  
21 with a proposal of some kind regarding consolidation  
22 which we will want to look at it very closely.

23 THE COURT: Aren't you proposing to do that  
24 within the week?

25 MR. MILLER: No, within the week would be our

1 structure. It can take a little bit longer to make a  
2 judgment about what would be the next step in the  
3 prosecution of the case.

4 THE COURT: You mean what you would propose  
5 to be consolidated?

6 MR. MILLER: Yes, exactly right.

7 THE COURT: How long is that going to take?

8 MR. MILLER: That won't take long, Your  
9 Honor.

10 MR. ISQUITH: I wonder if I could be heard  
11 just for a second?

12 THE COURT: Okay, but put your appearance  
13 on.

14 MR. ISQUITH: I have, but my name is Fred  
15 Isquith.

16 THE COURT: I know you have, but we need it  
17 now for the record.

18 MR. ISQUITH: From the Wolf Haldenstein  
19 firm. It is not to contradict any of this Gentleman's  
20 procedure. In a week, we will have, we hope, a proposed  
21 order to present to Your Honor, and of course we will  
22 present it the Defendants, with regard merely to the  
23 organization of Plaintiffs' Counsel.

24 **THE COURT:** Okay.

25 MR. ISQUITH: Then, Plaintiffs' Counsel so

1 organized will deal with the Defendants with respect to  
2 consolidation or the coordination issue an the filing of  
3 papers and perhaps, you know, the inevitable motions and  
4 timing and stuff like that. And we would then have a  
5 second proposal to Your Honor or a pretrial order number  
6 two, a second proposed order to Your Honor on the timing  
7 of that.

8 Now, usually we can get that done within a  
9 few days as well, but it wouldn't be surprising to me if  
10 two weeks from today we didn't have all those papers in  
11 front of you.

12 MR. ETTINGER: Your Honor, if we can work it  
13 out, of course, that's fine, everybody is happy. But  
14 right now, we have a lot of disputes about  
15 consolidation, a motion in opposition. So if we can't  
16 work it out --

17 THE COURT: I'll rule.

18 MR. ETTINGER: Well, I think we don't know  
19 even know what you would be ruling on at this point.

20 THE COURT: Your Motion.

21 MR. ETTINGER: I think what I'm hearing them  
22 say, and I don't mean to complicate this, I don't know,  
23 they may have a different proposal and a different  
24 motion on consolidation than they have offered today.

25 THE COURT: And that is what I heard, too,

1 and that they would try to get you to agree with that.

2 MR. ETTINGER: Right.

3 THE COURT: And if you don't agree with it,  
4 I am back to their original Motion to Consolidate, and  
5 if they want me to consider a different motion, then  
6 they will have to file a motion.

7 MR. ETTINGER: That's all I was heading  
8 towards, Your Honor.

9 THE COURT: So here is the schedule. April  
10 26th, you give me the proposed private organization of  
11 Plaintiffs' Counsel to approve or not.

12 And on May 3rd, the Defendants can, and I  
13 suppose it should be couched as an objection, right.  
14 What are you going to entitle it? You don't know yet.

15 So if it is just a proposed something and it  
16 is not a motion, you should caption yours an objection  
17 to that if you object. And if you don't object, you  
18 should file something saying you don't object.

19 And then on consolidation, what do you want,  
20 another week after that?

21 MR. MILLER: Yes, that's plenty, Your Honor.

22 THE COURT: So that would then be May 11.  
23 And if you object to that, I suppose you object by the  
24 19th.

25 Does the Government think they're going to

1 want to be involved in that?

2 MR. WAYLAND: I can't imagine so at this  
3 point, Your Honor, but we will watch.

4 THE COURT: If you do, and by the Government  
5 I also meant Michigan, so if you do, the same guidelines  
6 apply to you, okay?

7 MR. WAYLAND: Yes, Your Honor.

8 MR. PASCOE: Yes, Your Honor.

9 THE COURT: And then you've lost your  
10 opportunity to have a hearing for the rest of the month  
11 following that. So we will be in June, at which time we  
12 can hear those other motions. So what day are we going  
13 to hear those motions, Ms. Daley? Do you already have  
14 that date.

15 June 7th at 2:00. Is that satisfactory to  
16 everyone?

17 MR. STENERSON: May I ask one question?  
18 Will we also have the status conference on June 7th?

19 THE COURT: Relative to the status?

20 MR. STENERSON: Relative to the same subject  
21 matters that I thought was initially a status conference  
22 was scheduled for today.

23 THE COURT: Right, but I assumed that you  
24 all are going to address that; is that right? I heard  
25 the Plaintiffs, maybe I broaden my interpretation of



1 what they was saying, but what I heard from the  
2 Plaintiffs was also a schedule; am I mistaken?

3 MR. MILLER: Yes, Your Honor, you are  
4 correct.

5 THE COURT: And then the Government may want  
6 to be involved in that, right?

7 MR. WAYLAND: With respect to scheduling,  
8 yes, Your Honor, we certainly would want to be.

9 THE COURT: So you should make sure you  
10 include the Government in the conversations on  
11 scheduling.

12 MR. MILLER: Yes, Your Honor, we will.

13 THE COURT: So there are like four different  
14 schedules that I have, right?

15 MR. McNEILL: Your Honor, what motions will  
16 you be hearing on June 7th?

17 THE COURT: The two motions filed yesterday  
18 at 6 p.m.

19 MR. McNEILL: Thank you.

20 THE COURT: And I don't know when I will  
21 decide your Motion that you're concerned about.

22 MR. McNEILL: The one that I'm not arguing?

23 THE COURT: But I would say that I reserve  
24 the right to rule on it at any time. And until then,  
25 you're not taking discovery now, right? Are you?

1 MR. WAYLAND: Well, there were two motions,  
2 Your Honor. There was a Motion to Stay and --

3 THE COURT: And the Motion to Compel.

4 MR. WAYLAND: The Motion to Compel because  
5 they didn't respond to any discovery while their motion  
6 is pending, so we would like them to respond.

7 MR. MCNEILL: Your Honor, under Rule 34, we  
8 did respond. We file objections, so that brings us to  
9 the procedural point we're at now. Without arguing.

10 THE COURT: I reserve the right to rule on  
11 that at a time that I see fit.

12 Taking seriously your submissions.

13 Anything else we need to take up?

14 I need to see the schedule. Whatever  
15 schedule you're going to propose, I guess I don't see  
16 that until the 19th? Or the 11th. May 11th is when  
17 you think you will have that, too?

18 MR. MILLER: Yes, we will present it to Your  
19 Honor.

20 THE COURT: Anything further today?

21 MR. WAYLAND: Not from the Government, Your  
22 Honor.

23 MS. OLIVER: Just on one issue. I have an  
24 out of state attorney who still needs to be sworn.

25 THE COURT: I'm not going to make everyone

1 stay on that.

2 MR. WAYLAND: Your Honor, I'm sorry, I  
3 misspoke, I did have one other piece of business before  
4 the Court.

5 During my argument, I made reference to two  
6 pieces of paper, and I said I would hand them up the end  
7 and I failed to do that.

8 THE COURT: That's alright, I will take them  
9 now.

10 The other side has them as well, right?

11 MR. WAYLAND: They will right now.

12 THE COURT: Okay, good.

13 MR. WAYLAND: This is the Complaint that we  
14 referred to.

15 THE COURT: Okay, thank you very much.

16 In the Southern District of Ohio, Western  
17 District, the Total Benefits Complaint?

18 MR. WAYLAND: Yes, Your Honor.

19 And the Kolon case, Your Honor, which we had  
20 a copy of, and now we can't seem to find it.

21 Here it is, I have it, Your Honor.

22 May I approach again?

23 THE COURT: Yes, you may.

24 And your Motion that you argued today is  
25 under advisement.

1                   And the Court, unless anyone has anything  
2 further, in recess, except Ms. Oliver, you can step to  
3 the sidebar with your attorney.

4                   (Proceedings concluded at 5:26 p.m.)

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1 C E R T I F I C A T E

2 I, CHERYL E. DANIEL, OFFICIAL COURT

3 REPORTER, after being first duly sworn, say that I  
4 stenographically recorded the foregoing proceedings  
5 held on the day and date hereinbefore recorded; that  
6 upon order of the Court or counsel, I caused those  
7 stenotype notes to be reduced to typewritten form via  
8 computer-assisted technology, and that this transcript  
9 constitutes a true, full and complete transcript of  
10 those proceedings so ordered.

11 I further certify that I am not related to  
12 any party to these proceedings nor have any interest in  
13 the outcome of said proceedings.

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15 S/Cheryl E. Daniel

16 FEDERAL OFFICIAL COURT REPORTER

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